DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-9646
Title: Evan Miller, Petitioner
v.
Alabama
Docketed: March 23, 2011
Linked with 10A697
Lower Ct: Court of Criminal Appeals of Alabama
Case Nos.: (CR-06-0741)
Decision Date: August 27, 2010
Discretionary Court
Decision Date: October 22, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jan 7 2011	Application (10A697) to extend the time to file a petition for a writ of certiorari from January 20, 2011 to March 21, 2011, submitted to Justice Thomas.
Jan 13 2011	Application (10A697) granted by Justice Thomas extending the time to file until March 21, 2011.
Mar 21 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 22, 2011)
Apr 15 2011	Waiver of right of respondent Alabama to respond filed.
Apr 27 2011	DISTRIBUTED for Conference of May 12, 2011.
May 2 2011	Response Requested . (Due June 1, 2011)
Jun 1 2011	Brief of respondent Alabama in opposition filed.
Jun 9 2011	Reply of petitioner Evan Miller filed.
Jun 16 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 7 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The case is to be argued in tandem with No. 10-9647, Jackson v. Hobbs, Dir., AR DOC.
Dec 7 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 9, 2012.
Dec 7 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, March 20, 2012.

Jan 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 9 2012	Joint appendix filed. (Statement of costs filed)
Jan 9 2012	Brief of petitioner Evan Miller filed.
Jan 13 2012	The time to file respondent's brief on the merits is extended to and including February 14, 2012.
Jan 13 2012	Brief amici curiae of American Medical Association, et al. filed. VIDED. (Distributed)
Jan 16 2012	Brief amici curiae of Amnesty International, et al. filed. VIDED.
Jan 17 2012	Brief amici curiae of Former Juvenile Court Judges filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Probation and Parole Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Psychological Association, et al. filed (Distributed). VIDED.
Jan 17 2012	Brief amici curiae of Jeffrey Fagan, et al. filed (Distributed). VIDED.
Jan 17 2012	Brief amici curiae of Certain Family Members of Victims Killed by Youths filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Professor of Law and His Students from Moritz College of Law at Ohio State University filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED. (Distributed)
Jan 23 2012	Record from the Court of Criminal Appeals of Alabama is electronic.
Jan 31 2012	CIRCULATED.
Feb 14 2012	Brief of respondent Alabama REPRINT filed. (Distributed)
Feb 14 2012	Appendix of Alabama filed. (Distributed)
Feb 21 2012	Brief amicus curiae of National District Attorneys Association filed. VIDED. (Distributed)
Feb 21 2012	Brief amici curiae of Michigan, et al. filed. VIDED. (Distributed)
Feb 21 2012	Brief amicus curiae of National Organization of Victims of Juvenile Lifers filed. VIDED. (Distributed)
Feb 24 2012	Motion of Michigan, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. VIDED.
Mar 5 2012	Motion of Michigan, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED. VIDED.
Mar 12 2012	Reply of petitioner Evan Miller filed. (Distributed)
Mar 20 2012	Argued. For petitioner: Bryan A. Stevenson, Mongtomery, Ala. For respondent: John C. Neiman, Jr., Solicitor General, Montgomery, Ala.
Jun 25 2012	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Breyer, J., filed a concurring opinion, in which Sotomayor, J., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, j., joined. Alito, J., filed a dissenting opinion, in which Scalia, J., joined.

PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EVAN MILLER, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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March 21, 2011

QUESTIONS PRESENTED

Evan Miller was sentenced to a mandatory sentence of life imprisonment without parole for a homicide offense committed when he was only fourteen years old. Evan is one of only seventy-three fourteen-year-olds nationwide who are serving such sentences. The questions presented are:

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide – a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances – violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?

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PETITION FOR WRIT OF CERTIORARI

Evan Miller respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010), has not yet been reported and is attached as Appendix A. The order of the Alabama Court of Criminal Appeals withdrawing its previous opinion, substituting a new opinion, and overruling petitioner's application for rehearing, Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. Aug. 27, 2010), is unreported and is attached as Appendix B. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals, Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010), is unreported and is attached as Appendix C.

JURISDICTION

The initial judgment of the Alabama Court of Criminal Appeals was issued on June 25, 2010. Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. June 25, 2010). That court overruled a timely application for rehearing, withdrew its opinion, and substituted a new opinion on August 27, 2010. Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010). The Alabama Supreme Court denied Mr. Miller's timely Petition for Writ of Certiorari to the Alabama Court

of Criminal Appeals on October 22, 2010. Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010). On January 13, 2011, Justice Thomas extended to and including March 21, 2011, the time for filing this petition for writ of certiorari. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents important constitutional questions regarding the propriety of imposing a mandatory sentence of life imprisonment without parole on a fourteen-year-old child. Petitioner Evan Miller is one of only seventy-three children who have been condemned to be imprisoned until death for an offense committed when they were fourteen years of age or younger. Evan, like nearly all of these young adolescents, was sentenced under a statute that made a life-without-parole sentence mandatory, precluding any consideration of his age or other mitigating circumstances which would call for a sentence of less than lifelong incarceration.

A. The Rarity of Life Without Parole Sentences for Young Adolescents

Nationwide, Evan Miller is one of only seventy-three children age fourteen or younger who have been condemned to die in prison through sentences of life without parole.[1] In the vast majority of states, no child Evan's age has ever received such a sentence. Only eighteen states have imposed such sentences on children fourteen or younger.[2] In ten of these states, including Alabama, no more than one or two children Evan's age have been sentenced to life imprisonment without parole. Moreover, in most states where children fourteen or younger have been sentenced to life without parole, the legislatures have never expressly authorized life-without-parole sentences for young children; such sentences are a byproduct of legislation expanding the susceptibility of juveniles to adult prosecution.[3] Internationally, the United States is the only country in the world where death-in-prison sentences have been imposed on

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[1] Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 (2007), available at http://www.eji.org/eji/files/20071017cruelandunusual.pdf [hereinafter Cruel and Unusual]. Prior to the publication of this report, Evan presented evidence below that there were approximately five dozen children fourteen or younger. (C. 170.) Since the publication of this report, while a handful of these children have obtained relief from their convictions or sentences, including under this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), there have also been a few new sentences imposed. Thus, this number remains fairly constant at just over seventy children.

[2] Cruel and Unusual at 20. This report identified eighteen states, in addition to Alabama, where thirteen- or fourteen-year-olds have been sentenced to death in prison. A total of eighteen states, not nineteen, is more relevant to this Court's analysis because California statutorily prohibited the imposition of life imprisonment without parole on a defendant under age sixteen who, like Evan Miller, is convicted of first-degree murder, Cal. Pen. Code, § 190.5(b), and also no longer permits fourteen-year-olds to be sentenced to life without parole for any offense, see In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[3] See Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Juvenile Justice: A Century of Change 4–5 (1999), available at http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (describing the expansion of laws exposing children to trial as adults).

young adolescents.[4]

These seventy-three cases represent just a tiny fraction of cases in which children fourteen or younger might have received such sentences. According to the FBI's Uniform Crime Statistics, since 1990, 3,632 children age fourteen or younger were arrested for homicide.[5] Yet only fifty-eight children that age have been sentenced to life without parole for homicide offenses during the same period, representing less than two percent of those arrested.

B. Evan Miller's Background, Offense, and Conviction

Evan Miller's childhood up to the age of fourteen was characterized by violent physical abuse, extreme neglect, and severe poverty. Both his parents were alcoholics and his mother was also addicted to illegal drugs. (C. 83; Ex. 59.)[6] The family moved so often that, at trial, his mother could not recall all the schools Evan had attended. (R. 1213.)

Beginning at an early age, Evan's father frequently inflicted severe beatings on Evan, his mother, and his siblings. (R. 1208; Ex. 59; C. 83.) After one such incident, at the age of five, Evan attempted to hang himself in order to escape his father's violence. (R. 1209.) Evan went on to attempt suicide five more times during his

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[4]See Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983, 990 (2008).

[5]This total is based on the Department of Justice Uniform Crime Reports for 1990 to 2009. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year at Table 38.

[6]References are to the appellate record below in this case. "C." refers to the clerk's record. "R." refers to the trial transcript. "Ex." refers to the exhibit volume pages. "S." refers to the supplemental record.

childhood. (R. 1210; C. 84.) He also attempted to escape his brutalizing environment by drinking and using drugs beginning as young as age eight. (C. 83–84; see also R. 1210–12.) Unable to cope with his life of violence and neglect, he also began receiving mental health treatment at age eight (C. 84); he was treated intermittently during his childhood by several local mental health centers. (R. 1206.)

When Evan was ten, the state finally responded to his father's abuse by removing him and his siblings from their home and placing him in foster care. (R. 1207–08; C. 83.) His parents divorced at that time. (Ex. 59.) After he was returned to the custody of his drug-addicted mother a few years later, she continued to fail to provide him with the most basic necessities or even minimal supervision. (R. 1214, 1251; C. 86.) With no guidance or support, Evan followed his parents' models: his own drug addiction continued to escalate, ultimately leading to daily off-label use of prescription medications in addition to frequent use of marijuana and crystal methamphetamines. (C. 84.)

In this environment, late at night on July 15, 2003, Evans' fifty-two-year-old neighbor, Cole Cannon, interrupted Evan, his family, and his friend, Colby Smith, as they prepared to go to bed. (R. 710, 1135.) Evan was then fourteen years old; Colby Smith was sixteen. (R. 1022.) Mr. Cannon, who was visibly intoxicated (R. 980), made a drug deal with Evan's mother within earshot of the two boys. (R. 1004.) Later, when Mr. Cannon returned to his own home, the two boys accompanied him. Mr. Cannon gave them alcohol (R. 710) and asked the boys to go buy some marijuana with money that he provided. (R. 1008, 1012.) The three of them all smoked the marijuana and

played drinking games. (R. 983.) Colby Smith testified that the boys planned to steal Mr. Cannon's wallet. (R. 981.) By this point of the evening, Evan was highly intoxicated, having consumed almost a fifth of whiskey and two Klonopin pills in addition to the marijuana that he smoked. (R. 873.)

At some point while the boys were at Mr. Cannon's home, an altercation began. The cause of the altercation was disputed, but both boys agreed that Mr. Cannon initiated the physical aggression by grabbing Evan's throat. (R. 710–11, 984.) Colby admitted at trial that he reacted by beating Mr. Cannon in the head with a baseball bat. (R. 985.) Colby also testified that Evan later hit Mr. Cannon with the bat (R. 985), although Evan told police in his statement that he hit Mr. Cannon with his fists. (R. 711.) Colby claimed that Evan then put a sheet over his head and said, "I am God, I've come to take your life." (R. 986.) Both boys started fires in the home. (R. 1019.) As they were doing so, Mr. Cannon asked Colby, "[W]hy are y'all doing this to me?" (R. 990.) The boys then left. (R. 991.) Mr. Cannon died later that morning of smoke inhalation. (R. 939.)

A week later, Evan was brought to the police station and interrogated regarding Mr. Cannon's death. (R. 699–701.) Although Evan, who had only a seventh grade education (R. 701), did not understand his rights to remain silent or to consult a lawyer (R. 666–67, 1162–63), after two hours of questioning by adults (R. 656), he signed an inculpatory statement written by the investigating officer (Ex. 9; R. 773), and he was then arrested (R. 714).

The State moved to transfer Evan from the juvenile to the circuit court for trial

as an adult. After denying the defense funds to hire an independent mental health expert to evaluate Evan, the juvenile court ordered that Evan's case be transferred. See Ex parte E.J.M., 928 So. 2d 1081 (Ala. 2005). In making this determination, the juvenile court judge gave no consideration to whether life without parole would be an appropriate sentence if Evan were convicted. (C. 25–27.)

Evan was subsequently indicted for two counts of capital murder. (C. 10–11.) In exchange for testifying against Evan, sixteen-year-old Colby Smith was permitted to plead guilty to felony murder and was sentenced to life with parole eligibility. (R. 1037.) Following a jury trial, Evan was convicted of capital murder in the course of an arson but acquitted of capital murder in the course of a robbery. (C. 93.) On the same day and without further proceedings, Evan was sentenced to a mandatory sentence of life in prison without the possibility of parole. (R. 1399.) At sentencing, Evan expressed remorse for his actions and apologized to the victim's family, even though he knew it could not make any difference in the sentence he received. (R. 1399.)

C. Procedural History and the State Court Ruling on Review

Evan's trial counsel filed a pretrial motion challenging the constitutionality of the mandatory life-without-parole sentence that would apply if he were convicted, which was denied by the circuit court. (C. 57–58.) Following his conviction and sentence, Evan's counsel filed a motion for new trial raising a categorical challenge to life without parole sentences for children fourteen and younger as cruel and unusual under the Eighth and Fourteenth Amendments to the United States Constitution (C. 100–05) and presenting uncontroverted evidence of the rarity of such sentences (C.

169–70). Evan's motion also challenged as cruel and unusual the imposition of a mandatory life-without-parole sentence on a fourteen-year-old without any opportunity to consider his young age or other mitigating circumstances. (C. 105–15.) The circuit court denied the motion. (C. 116.)

Evan filed a timely appeal from his conviction and sentence in the Alabama Court of Criminal Appeals. He continued to raise his categorical challenge to the constitutionality of sentencing a fourteen-year-old child to life imprisonment without parole, and his challenge to the constitutionality of imposing a mandatory sentence of life without parole on a fourteen-year-old child. Br. of Appellant at 7–29, Miller v. State, No. CR-06-0741 (Ala. Crim. App. June 6, 2007). The Alabama Court of Criminal Appeals affirmed Evan's conviction and sentence. See Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010).

With respect to Evan's categorical challenge, the Court of Criminal Appeals held that "Miller's sentence of life in prison without the possibility of parole — the second harshest sentence — for capital murder does not violate the Eighth Amendment." Id. at *9. Although the court acknowledged that this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), supplies the appropriate analysis, the court found that the number of fourteen-year-olds who have actually been sentenced to life imprisonment without parole "is of little value" in evaluating whether a national consensus against such sentences exists; and the court thus concluded that no consensus had been established. Miller, 2010 WL 2546422, at *6. The court found that "Miller was a juvenile when he committed capital murder; therefore, he must be

considered less culpable than adult offenders," but did not address Evan's argument that fourteen-year-olds also have lessened culpability when compared to older juveniles. Id. at *7. The court concluded that the seriousness of the offense of capital murder supported a sentence of life imprisonment without parole regardless of age. Id. at *7–8. Turning to Evan's mandatory sentencing claim, the court cursorily disposed of the issue by finding that it was foreclosed by this Court's decision in Harmelin v. Michigan, 501 U.S. 957, 995–96 (1996), without addressing whether Evan's young age might impact the analysis. Miller, 2010 WL 2546422, at *9.

Evan filed a timely application for rehearing, which was denied. He then petitioned the Alabama Supreme Court for a writ of certiorari to review the decision of the Alabama Court of Criminal Appeals, again raising both challenges to his sentence. Pet. for Writ of Cert. at 4–16, Ex parte Miller, No. 1091663 (Ala. Sept. 10, 2010). The Alabama Supreme Court denied the writ. Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010). This petition follows.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER SENTENCING A FOURTEEN-YEAR-OLD CHILD TO LIFE IMPRISONMENT WITH NO POSSIBILITY OF PAROLE CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Evan Miller is one of only seventy-three children in this country who have been sentenced to spend the rest of their natural lives in prison, with no eligibility for parole consideration at any time, as a result of a crime committed when they were fourteen

years of age or younger. Their sentences are unusual in the extreme, but they are not unimportant. In the wake of Graham v. Florida, 130 S. Ct. 2011 (2010), and Sullivan v. Florida, 130 S. Ct. 2059 (2010), this Court will inescapably be called upon, sooner or later, to determine whether sentences such as these violate the Constitution's ban on cruel and unusual punishments. Petitioner Miller respectfully urges that that determination be made now, before he is consigned to imprisonment with no hope that he can ever be considered for release alive.

Children fourteen and younger are a distinct group of juvenile offenders. Under this Court's reasoning in Roper v. Simmons, 543 U.S. 551 (2005), and Graham, the identical analysis which led to the results in those cases logically compels the conclusion that consigning a fourteen-year-old child to die in prison through a life-without-parole sentence categorically violates the Eighth and Fourteenth Amendments to the United States Constitution. The Court should grant review in Evan Miller's case to make that logical conclusion the law of the land.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'" Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). This precept "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

In recent years, this Court has twice addressed the application of the Eighth Amendment to harsh penalties imposed on children and has recognized each time that

the substantial differences between children and adults are constitutionally relevant. In Roper, this Court addressed cases in which older teens had been convicted of aggravated homicide and sentenced to death. This Court found that, even in the most serious murder cases, three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." Id. at 569. When compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility," they "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed." Id. at 569–70. Because these differences make juveniles less culpable than adults, this Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." Id. at 573–74.

In Graham, this Court found that the same differences between children and adults recognized in Roper are also relevant when reviewing the constitutionality of sentences of life imprisonment without parole. Id. at 2026. In Graham, the Court specifically addressed a case in which a sixteen-year-old had been sentenced to life without parole for armed burglary. Id. at 2020. The Court held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." Id. at 2030. Graham thus applied the reasoning of Roper – including Roper's recognition that differences between children and adults are constitutionally significant – to resolve an age-based categorical Eighth Amendment

challenge to a sentence of life imprisonment without parole. Id. at 2022–23, 2026.

Thus, this Court has now held that a child convicted of aggravated homicide is entitled to Eighth Amendment protection against excessive punishment despite the heinous nature of the offense, Roper, 543 U.S. at 573–74, and that the Eighth Amendment's limitations on severity in punishing children apply to sentences of life imprisonment without parole, Graham, 130 S. Ct. at 2030. But these generalities, important as they are, are not all that Roper and Graham contribute to the proper analysis of the issues presented by Evan Miller's case. A fair reading of the detailed reasoning of the Roper and Graham opinions demonstrates that every factor which the Court considered constitutionally critical to the results in those cases equally or more strongly compels the invalidation of Evan's life-without parole sentence.

A. Children Fourteen and Younger Are a Distinct Group of Juveniles for Whom a Sentence of Life Imprisonment Without Parole is Unconstitutional.

As we have noted above, Roper and Graham stress three key features of youth as bearing on the judgment that young offenders are significantly less culpable than adults: children's lack of maturity, their vulnerability to negative external influences, and the fact that they are not fully formed personalities but rather human works in progress. Each of these considerations gains added force in considering the culpability of children fourteen years of age and younger. Unlike the older teens addressed in Roper and Graham, Evan was only fourteen years old at the time of the offense for which he was sentenced to life imprisonment without parole. Young adolescents like Evan are legally and developmentally distinct from older teens and adults in ways that

are constitutionally relevant to the excessiveness of punishment under Roper and Graham.

Alabama, like every other state and the federal government, has long recognized that fourteen-year-olds, more than older teens, are in need of additional protections and unprepared for adult responsibilities.[7] Unlike older teens, fourteen-year-olds are considered incapable of consenting to sexual activity, Ala. Code § 13A-6-70, and prohibited from marrying, even with parental consent, Ala. Code §§ 30-1-4. They cannot drive, or even obtain a learners permit, Ala. Code §§ 32-6-7, 32-6-8, or work more than limited hours, Ala. Code § 25-8-33. Because of their greater vulnerability, fourteen-year-old crime victims are given extra protections under a number of criminal statutes that do not apply to older teens. Ala. Code §§ 13A-6-40, 13A-6-62, 13A-6-64, 13A-6-67, 13A-6-69, 13A-13-6, 15-3-5, 15-25-2–3. That these restrictions and protections are not applied to late adolescents demonstrates that society recognizes that early adolescents are developmentally distinct from adults and older teens.

Recent scientific research of the identical kind relied on by this Court in Roper and Graham supports the legal recognition of young adolescence as a distinct developmental period. See Graham, 130 S. Ct. at 2026–30; Roper, 543 U.S. at 569–75. Relative to the cognition of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options

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[7] See also App. to Br. for Pet'r, Sullivan v. Florida, 130 S. Ct. 2059 (2010) (cataloguing hundreds of state laws that distinguish between younger and older adolescents).

and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to make reasoned judgments and stick by them.[8] Even when compared to twelfth graders (rather than adults), eighth graders show relative deficiencies in imagining risks and future consequences.[9] At fourteen, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[10]

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[8]See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267–70 (1989) (Young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolscents); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

[9]Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538, 543 (1981); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

[10]See Luna, supra note 8, at 257; see also Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212, 216 (2009); see also Giedd, supra, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, supra, at 80.

Cortical gray matter is thickest early in adolescence. Id. at 82. Later in the teenage years, this

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking.[11] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[12] "The temporal gap between the arousal of the

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cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. Id.; see also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417, 439 (2000).

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861, 862 (1999); see also Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatrix Luna & John A. Sweeney, The Emergence of Collaborative Brain Function, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587, 596 (1998); see also Halpern-Felsher & Cauffman, supra note 9, at 271 ("Importance progress in the development of decision-making competence occurs sometime during late adolescence. . . .")

[11] See, e.g., Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55, 56–58 (2007); Geier & Luna, supra note 10, at 218; Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

[12] Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev. Psychol. 1764, 1764 (2008).

socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[13] This is compounded by the fact that, while all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early adolescence to an all-time high in eighth grade.[14] Indeed, extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[15] But most teens grow out of this behavior as a predictable part of the maturation process.[16]

Young adolescents also have less ability than older adolescents and adults to free themselves from morally toxic or dangerous environments. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped

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[13]Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[14]Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); id. at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); see also Mann supra note 8, at 267–268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, Risk-Taking, supra note 11, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15)

[15]Spear, supra note 10, at 421; Reppucci, supra note 14, at 319.

[16]Spear, supra note 10, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, supra note 14, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

sense of responsibility – including restrictions on driving, working, and leaving school – also operate conversely to disable a fourteen-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.

Young teens, to a greater extent than older teens, are also handicapped by their undeveloped sense of self and their inability to imagine their futures.[17] It is not until the late teens or early twenties that they begin to form a coherent identity – although teens sixteen and older have a more mature sense of self than adolescents under fifteen.[18] Very few young adolescents think about their future beyond age 30.[19] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate long-term consequences

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[17]See Nurmi, supra note 8, at 12–13; see also Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, supra note 16, at 229 ("Many adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci, supra note 14, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78, 90 (2008) (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[18]Steinberg, Social Neuroscience, supra note 17, at 94 (future orientation and planning increase from 16–18); Seagrave & Grisso, supra note 16, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); id. at 229 (adolescents "focus excessively on present circumstances").

[19]Nurmi, supra note 8, at 27.

improves.[20]

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical fourteen-year-old who acts irresponsibly in reaction to a thrilling impulse or succumbs to peer pressure is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[21]

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[22]

As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[23] This particular vulnerability has longstanding recognition in the laws of every state. For these reasons, adolescents fourteen and

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[20]Id. at 27–29.

[21]See supra note 16.

[22]Steinberg, supra note 13, at 478.

[23]See, e.g., Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham, et al., Future Orientation]; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007); Steinberg, Cauffman, et al., supra note 12, at 1775–76.

younger are a distinct group of young offenders who must be considered separately from older juveniles when evaluating whether a sentence of life imprisonment without parole is cruel and unusual.

B. The Extreme Rarity With Which Life Without Parole Sentences Are Imposed on Fourteen-Year-Old Children Demonstrates That There Is a National Consensus Against Such Sentences.

In evaluating whether a sentence is cruel and unusual, "[t]he analysis begins with objective indicia of national consensus." Graham, 130 S. Ct. at 2023. This Court has recognized that "[a]ctual sentencing practices are an important part of the . . . inquiry into consensus." Id. Evan is one of only two children in the State of Alabama serving a sentence of life imprisonment without the possibility of parole for a crime committed at the age of fourteen. Nationwide only seventy-three children age fourteen or younger have been sentenced to spend the rest of their lives in prison.[24] This number is substantially less than the 123 sentences which this Court in Graham found demonstrated that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2024, 2026. It is also similar to the number of sentences found indicative of a national consensus in previous cases. When Roper recognized a national consensus against death sentences for juveniles, seventy-two juvenile offenders were under that sentence.[25] When Atkins v. Virginia, 536 U.S. 304 (2002), found a national consensus against death sentences for persons with mental retardation, it was

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[24] See Cruel and Unusual, supra note 1, at 20.

[25] Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – September 30, 2004 3 (2004), available at http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

estimated that one to three percent of the death-row population – roughly seventy-one people – were mentally retarded.[26]

The total of seventy-three young adolescents who are serving sentences of life without parole is particularly strong evidence of the rarity of these sentences for two reasons. First, as this Court noted in Graham, because "a juvenile sentenced to life without parole is likely to live in prison for decades," "these statistics likely reflect nearly all [young adolescent] offenders who have received a life without parole sentence stretching back many years." 130 S. Ct. at 2024. Second, as laid out in the Statement of the Case above, these cases represent just a tiny fraction of cases in which people fourteen or younger might have received such sentences. Of the 3,632 children age fourteen or younger arrested for homicide since 1990, less than two percent of these children were sentenced to life imprisonment without parole.[27] This Court in Graham found that similar data supported a conclusion that the sentencing practice at issue was unusual. 130 S. Ct. at 2025.

Additionally, children fourteen or younger are known to have been sentenced to life without parole in only eighteen states; and, in ten of these states, no more than one or two children have received that sentence.[28] Thus, in most states, no child Evan's age

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[26]See Atkins, 536 U.S. at 309 n.5; Death Penalty Information Center, Size of Death Row By Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year (last visited Mar. 21, 2011) (showing 3,557 death row inmates in 2002).

[27]See supra page 4 & note 5.

[28]Cruel and Unusual, supra note 1, at 20. Although this report indicates that there are nineteen states in which thirteen- and fourteen-year-olds have been sentenced to life without parole, there are now only eighteen because the only such sentence in California has recently been overturned. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

has been subjected to life imprisonment without possibility of parole. That only a minority of states have imposed these sentences is strong evidence of a national consensus. See, e.g., Roper, 543 U.S. at 564–65; Atkins, 536 U.S. at 316.

One of these eighteen states, Colorado, no longer allows imposition of life without parole on any juvenile. See Colo. Rev. Stat. § 17-22.5-104(IV). California courts have also now prohibited life without parole for children under sixteen. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009). The fact that these two states that formerly permitted this sentence have moved away from it makes clear that the trend is against imposing this unusual sentence. Reflecting this trend, in 2009, Texas also formally abolished life without parole for all juveniles. See Tex. Penal Code Ann. § 12.31(b)(1).

As Graham recognized, this strong evidence of a national consensus is not undermined by the fact that many states do not explicitly prohibit life without parole for fourteen-year-old children. 130 S. Ct. at 2025. While most states have statutory schemes that theoretically permit a life-without-parole sentence for a fourteen-year-old child (because these states have made the two distinct decisions (1) to authorize they life-without-parole sentences for adults and (2) to authorize the transfer of fourteen-year-olds to adult court), this is insufficient to demonstrate that these states have made the deliberate judgment that such a sentence is appropriate, especially where, as in the vast majority of states, such a sentence has never actually been imposed. See Graham, 130 S. Ct. at 2025 ("[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a

judgment that many States intended to subject such offenders to life without parole sentences."); Thompson v. Oklahoma, 487 U.S. 815, 829 n.24 (1988) (plurality op.) ("That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.").

The extreme rarity with which sentences of life imprisonment without parole are imposed on fourteen-year-old children demonstrates that "[t]he sentencing practice now under consideration is exceedingly rare." Graham, 130 S. Ct. at 2026. The national consensus against such sentences strongly supports the conclusion that such sentences are cruel and unusual.

C. The Characteristics of Fourteen-Year-Old Offenders Demonstrate That the Extremely Harsh, Permanent Punishment of Life Without Parole Is Not Appropriate.

In addition to community consensus, this Court has also looked to "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question," including "whether the challenged sentencing practice serves legitimate penological goals." Graham, 130 S. Ct. at 2026. Here, the characteristics of fourteen-year-olds frustrate any possible purpose for imposing the permanent sanction of life imprisonment without parole.

As discussed above, both Roper and Graham recognized that teenagers differ from adults in that they suffer from "[a] lack of maturity and an underdeveloped sense

of responsibility," "are more vulnerable or susceptible to negative influences and outside pressures," and their character "is not as well formed as that of an adult." Roper, 543 at 569–70. The research cited at pages 13 to 18 above documents beyond dispute that each of these characteristics applies with even greater force to young adolescents. Compared to older teens, fourteen-year-olds are less mature and more impulsive, have even more limited control of their environments, are uniquely susceptible to peer pressure, and have a greater capacity for change.

As to the severity of the sentence, Graham recognized that, while death sentences are unique, a sentence of life without parole also "alters the offender's life by a forfeiture that is irrevocable." Id. at 2027. Such a sentence "deprives the convict of the most basic liberties without giving hope of restoration." Id. Moreover, "[l]ife without parole is an especially harsh punishment for a juvenile," who will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. For these reasons, Evan's life without parole sentence constitutes an extremely harsh, final judgment that denies all hope for the future.

None of the generally recognized purposes of punishment is adequate to justify imposing such a permanent sentence on a young adolescent. "Retribution is a legitimate reason to punish," but "'[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" Graham, 130 S. Ct. at 2028 (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)). As both Roper and Graham recognized, even with respect to older teens, "the case for retribution is not as strong with a minor as with an adult." Id. (quoting Roper,

543 U.S. at 571). "[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments." Graham, 130 S. Ct. at 2026; see also Roper, 543 U.S. at 571. "A juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" Graham, 130 S. Ct. at 2026 (quoting Thompson, 487 U.S. at 835). It is still more true of younger teens that their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." Roper, 543 U.S. at 571. Much like the older juvenile nonhomicide offenders addressed in Graham, young adolescents in many ways have a "twice diminished moral culpability," 130 S. Ct. at 2027, compared to adults because they are an additional step behind even older teens in their maturity and development.

The deterrence rationale for punishment also fails in the case of young adolescents. Even with respect to older teens, this Court has recognized that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571. Teenager's impulsivity and lack of future-orientation means that they are "less likely to take a possible punishment into consideration when making decisions." Graham, 130 S. Ct. at 2028–29. Again these observations are especially true of young adolescents. Given that eighth graders struggle to imagine their lives only a few years into the future, it is unlikely that they would plan their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Testing of individuals from ten and thirty years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or

older individuals."[29]

"[W]hile incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts," Graham, 130 S. Ct. at 2029, it is insufficient to support making a permanent, unalterable judgment about a young adolescent whose character is as yet unformed. "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." Graham, 130 S. Ct. at 2029. Yet even with respect to older teens, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, 543 U.S. at 572. Young adolescents have an even greater capacity for change, and thus, for "the sentencer to make a judgment that the juvenile is incorrigible" is particularly inappropriate. Graham, 130 S. Ct. at 2029.

Finally, a life without parole sentence for a young adolescent "forswears altogether the rehabilitative ideal." Id. at 2030. Given the especially high potential for rehabilitation of young adolescents, such a denial of the "chance to demonstrate growth and maturity," id. at 2029, cannot be justified. Because none of the purposes of punishment adequately supports a sentence of life without parole for a fourteen-year-old child, Evan should be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." Id. at 2030.

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[29]Steinberg, Graham et al., Future Orientation, supra note 23, at 36.

II. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION.

Evan Miller's sentence of life imprisonment without parole was mandatory.[30] The sentencing court was statutorily prohibited from considering Evan's young age or any other mitigating circumstances. This Court's recognition of the unique constitutional considerations relevant to imposing permanent criminal sentences on children calls into question the constitutionality of imposing a sentence of life without parole on a fourteen-year-old child without permitting the sentencer to consider whether or not the pentultimate sentence is appropriate for that individual child.

This Court has frequently engaged in close scrutiny of mandatory sentences under the Eighth Amendment. It has previously recognized that "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937). In the death penalty context, this Court has struck down mandatory sentences as inconsistent with "the fundamental respect for humanity underlying the Eighth Amendment" which "requires consideration of the character and record of the individual offender and the circumstances of the particular

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[30]Under Alabama law, the only available sentence for someone convicted of capital murder is life without parole or the death penalty. See Ala. Code § 13A-5-39 et seq.

offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 431 U.S. 633 (1977); Summer v. Shuman, 483 U.S. 66 (1987).

Correspondingly, this Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (emphasizing the importance of considering youth as a mitigating circumstance). In so finding, this Court noted the importance of individualized consideration where the nature of the sentence includes the "nonavailability of corrective or modifying mechanisms" such as "probation, parole, work furloughs." Lockett, 438 U.S. at 605.

Although this Court has previously upheld a mandatory life-without-parole sentence for an adult, this Court's recent jurisprudence regarding the imposition of permanent sentences on children compels a different result where such sentences are imposed on young teens like Evan. In both Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), this Court recognized that there are "[t]hree general differences between juveniles under 18 and adults": immaturity, impetuosity, and an underdeveloped sense of responsibility; susceptibility to outside influences, peer pressure, and other external persuasions of bad behavior; and the yet-to-be-developed, still-malleable nature of a young adolescent's personality. Mandatory

life-without-parole sentencing regimes not only fail to take account of these general characteristics; they affirmatively preclude consideration of the extent to which the considerations exist and are mitigating in the case of any individual young juvenile offender. See Graham, 130 S. Ct. at 2016; Roper, 543 U.S. at 569–70.

In Graham, this Court specifically recognized the importance of sentencing procedures that, at a minimum, permit consideration of the accused's young age. The Court noted that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031. Chief Justice Roberts, concurring in the judgment, also agreed that, in evaluating a sentence of life without parole imposed on a juvenile, "[t]here is no reason why an offender's juvenile status should be excluded from the analysis," and, indeed, an offender's age should play a "central role." Id. at 2039.

Since Graham, several state court judges have expressed doubts about imposing mandatory life-without-parole sentences on children. See Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011) (Brown, J., concurring) ("[T]his state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole."); id. (Danielson, J., dissenting) (stating he would find 14-year-old's life-without-parole sentence unconstitutional in part because "the circuit court could not consider the defendant's age or any other mitigating circumstances-the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility

of parole"); State v. Andrews, 329 S.W.3d 369, 388 (Mo. 2010) (Wolff, J., dissenting) ("The imposition of a life sentence without parole—without consideration of Andrews' age—fails to ensure that Andrews' sentence is proportional to his crime. As such, the Missouri sentencing mandate is flawed and violates the Eighth Amendment.").

It is noteworthy that the vast majority of the children fourteen and younger who have been sentenced to life imprisonment without parole have been condemned under mandatory sentencing schemes.[31] This fact confirms Graham's intuition that our nation's evolving standards of decency require the consideration of age as a mitigating circumstance. It demonstrates that where judges or juries have discretion to impose lesser sentences on young teens, they nearly always do so.

In this case, there was extensive mitigating evidence that the sentencing court was unable to take into account. This included not only the crucial fact of Evan's young age, but also his childhood of extreme physical abuse and consistent neglect by his parents; his repeated suicide attempts and struggles with addiction; the fact that the adult victim gave fourteen-year-old Evan and his sixteen-year-old co-defendant drugs and alcohol on the night of this offense; Evan's sincere expression of remorse for his participation in the crime; and the more lenient sentence received by his older, equally culpable co-defendant.

As this Court has recognized, "[l]ife without parole is an especially harsh

---

[31] Undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners to identify the seventy-three children fourteen and younger serving sentences of life imprisonment without parole. A review of these cases reveals that nearly all of these sentences, like Evan's, were mandatory.

punishment for a juvenile." Graham, 130 S. Ct. at 2028. The Eighth Amendment requires that such a severe and hopeless sentence should only be imposed on a fourteen-year-old, if at all, after an individualized determination that such a sentence is appropriate and necessary in a particular case. Accordingly, and for all the reasons stated above, this Court should grant certiorari and declare that Evan Miller's mandatory sentence violates the Constitution.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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March 21, 2011

APPENDICES

A. Alabama Court of Criminal Appeals, Opinion affirming conviction and sentence, Miller v. State, No. CR-06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010).

B. Alabama Court of Criminal Appeals, Order withdrawing previous opinion, substituting a new opinion, and overruling petitioner's application for rehearing, Miller v. State, No. CR-06-0741, 2010 WL 2546422 (Ala. Crim. App. Aug. 27, 2010).

C. Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex parte Miller, No. 1091663 (Ala. Oct. 22, 2010).

APPENDIX

ECORD
AND
RIEFS

Supreme Court, U.S.
FILED
FEB 14 2012
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No. 10-9646

In the Supreme Court of the United States

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals

STATUTORY APPENDIX TO BRIEF OF RESPONDENT

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UNITED STATES*

I. JUVENILE TRANSFER PROVISIONS

18 U.S.C. § 5032. Delinquency proceedings in district courts; transfer for criminal prosecution.

A juvenile alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States that (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), section 922(x) or section 924(b), (g), or (h) of this title, and that there is a substantial Federal

---

* All statutes are current per Westlaw as of January 31, 2012.

interest in the case or the offense to warrant the exercise of Federal jurisdiction.

....

A juvenile who is alleged to have committed an act of juvenile delinquency and who is not surrendered to State authorities shall be proceeded against under this chapter unless he has requested in writing upon advice of counsel to be proceeded against as an adult, except that, with respect to a juvenile fifteen years and older alleged to have committed an act after his fifteenth birthday which if committed by an adult would be a felony that is a crime of violence or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1005, or 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, 959), or section 922(x) of this title, or in section 924(b), (g), or (h) of this title, criminal prosecution on the basis of the alleged act may be begun by motion to transfer of the Attorney General in the appropriate district court of the United States, if such court finds, after hearing, such transfer would be in the interest of justice. In the application of the preceding sentence, if the crime of violence is an offense under section 113(a), 113(b), 113(c), 1111, 1113, or, if the juvenile possessed a firearm during the offense, section 2111, 2113, 2241(a), or 2241(c), "thirteen" shall be substituted for "fifteen" and "thirteenth" shall be substituted for "fifteenth".

....

II. LWOP PROVISIONS

18 U.S.C. § 1111. Murder.

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

....

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of murder in the first degree shall be punished by death or by imprisonment for life;

....

18 U.S.C. § 3591. Sentence of death.

(a) A defendant who has been found guilty of--

(1) an offense described in section 794 or section 2381; or

(2) any other offense for which a sentence of death is provided, if the defendant, as determined beyond a reasonable doubt at the hearing under section 3593--

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury that resulted in the death of the victim;

(C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or

(D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act,

shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced

to death who was less than 18 years of age at the time of the offense.

....

ALABAMA

I. JUVENILE TRANSFER PROVISIONS

ALA. CODE § 12-15-203. Transfer of cases from juvenile court.

(a) A prosecutor, before a hearing on a delinquency petition on its merits and after notifying, verbally or in writing, the juvenile probation officer, may file a motion requesting the juvenile court judge to transfer a child for criminal prosecution to the circuit or district court, if the child was 14 or more years of age at the time of the conduct charged and is alleged to have committed an act which would constitute a criminal offense as defined by this code if committed by an adult.

....

ALA. CODE § 12-15-204. Acts for which person who has attained age 16 shall be charged, arrested, and tried as adult; removal of person from jurisdiction of juvenile court.

(a) Notwithstanding any other provision of law, any person who has attained the age of 16 years at the time of the conduct charged and who is charged with the commission of any act or conduct, which if committed by an adult would constitute any of the following, shall not be subject to the jurisdiction of juvenile court but shall be charged, arrested, and tried as an adult:

(1) A capital offense.

....

II. LWOP PROVISIONS

ALA. CODE § 13A-5-45. Sentence hearing–Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death.

....

(f) Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

....

ALASKA

I. JUVENILE TRANSFER PROVISIONS

ALASKA STAT. § 47.12.030. Provisions inapplicable.

(a) When a minor who was at least 16 years of age at the time of the offense is charged by complaint, information, or indictment with an offense specified in this subsection, this chapter and the Alaska Delinquency Rules do not apply to the offense for which the minor is charged or to any additional offenses joinable to it under the applicable rules of court governing criminal procedure. The minor shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult. If the minor is convicted of an offense other than an offense specified in this subsection, the minor may attempt to prove, by a preponderance of the evidence, that the minor is amenable to treatment under this chapter. If the court finds that the minor is amenable to treatment under this chapter, the minor shall be treated as though the charges had been heard under this chapter, and the court shall order disposition of the charges of which the minor is convicted under AS 47.12.120(b). The provisions of this subsection apply when the minor is charged by complaint, information, or indictment with an offense

(1) that is an unclassified felony or a class A felony and the felony is a crime against a person;

(2) of arson in the first degree;

(3) that is a class B felony and the felony is a crime against a person in which the minor is alleged to have used a deadly weapon in the commission of the offense and the minor was previously adjudicated as a delinquent or convicted as an adult, in this or another jurisdiction, as a result of an offense that involved use of a deadly weapon in the commission of a crime against a person or an offense in another jurisdiction having elements substantially identical to those of a crime against a person, and the previous offense was punishable as a felony; in this paragraph, "deadly weapon" has the meaning given in AS 11.81.900(b); or

(4) that is misconduct involving weapons in the first degree under

(A) AS 11.61.190(a)(1); or

(B) AS 11.61.190(a)(2) when the firearm was discharged under circumstances manifesting substantial and unjustifiable risk of physical injury to a person.

II. LWOP PROVISIONS

ALASKA STAT. § 12.55.125. Sentences of imprisonment for felonies.

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS

11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) the court finds by clear and convincing evidence that the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

....

(j) A defendant sentenced to a (1) mandatory term of imprisonment of 99 years under (a) of this section may apply once for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the mandatory term without consideration of good time earned under AS 33.20.010, or (2) definite term of imprisonment under (*l*) of this section may apply once for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the definite term. A defendant may not file and a court may not entertain more than one motion for modification or reduction of a sentence subject to this subsection, regardless of whether or not the court granted or denied a previous motion.

....

ARIZONA

I. JUVENILE TRANSFER PROVISIONS

ARIZ. REV. STAT. ANN. § 13-501. Persons under eighteen years of age; felony charging; definitions. (footnotes omitted)

A. The county attorney shall bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is fifteen, sixteen or seventeen years of age at the time the alleged offense is committed and the juvenile is accused of any of the following offenses:

1. First degree murder in violation of § 13-1105.
2. Second degree murder in violation of § 13-1104.
3. Forcible sexual assault in violation of § 13-1406.
4. Armed robbery in violation of § 13-1904.
5. Any other violent felony offense.
6. Any felony offense committed by a chronic felony offender.
7. Any offense that is properly joined to an offense listed in this subsection.

B. Except as provided in subsection A of this section, the county attorney may bring a criminal prosecution against a juvenile in the same manner as an adult if the juvenile is at least

fourteen years of age at the time the alleged offense is committed and the juvenile is accused of any of the following offenses:

1. A class 1 felony.

2. A class 2 felony.

3. A class 3 felony in violation of any offense in chapters 10 through 17 or chapter 19 or 23 of this title.

4. A class 3, 4, 5 or 6 felony involving a dangerous offense.

5. Any felony offense committed by a chronic felony offender.

6. Any offense that is properly joined to an offense listed in this subsection.

....

II. LWOP PROVISIONS

ARIZ. REV. STAT. ANN. § 13-1105. First degree murder; classification.

....

D. First degree murder is a class 1 felony and is punishable by death or life imprisonment as provided by §§ 13-751 and 13-752.

ARIZ. REV. STAT. ANN. § 13-751. Sentence of death or life imprisonment; aggravating and mitigating circumstances; definition.

A. If the state has filed a notice of intent to seek the death penalty and the defendant is convicted of first degree murder as defined in § 13-1105, the defendant shall be sentenced to death or imprisonment in the custody of the state department of corrections for life or natural life as determined and in accordance with the procedures provided in § 13-752. A defendant who is sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis. If the defendant is sentenced to life, the defendant shall not be released on any basis until the completion of the service of twenty-five calendar years if the murdered person was fifteen or more years of age and thirty-five years if the murdered person was under fifteen years of age or was an unborn child. In this section, for purposes of punishment an unborn child shall be treated like a minor who is under twelve years of age.

....

ARIZ. REV. STAT. ANN. § 41-1604.09. Parole eligibility certification; classifications; appeal; recertification; applicability; definition.

....

I. This section applies only to persons who commit felony offenses before January 1, 1994.

ARKANSAS

I. JUVENILE TRANSFER PROVISIONS

ARK. CODE ANN. § 9-27-318. Filing and transfer to the criminal division of circuit court.

....

(c) A prosecuting attorney may charge a juvenile in either the juvenile or criminal division of circuit court when a case involves a juvenile:

(1) At least sixteen (16) years old when he or she engages in conduct that, if committed by an adult, would be any felony; or

(2) Fourteen (14) or fifteen (15) years old when he or she engages in conduct that, if committed by an adult, would be:

(A) Capital murder, § 5-10-101;

(B) Murder in the first degree, § 5-10-102;

(C) Kidnapping, § 5-11-102;

(D) Aggravated robbery, § 5-12-103;

(E) Rape, § 5-14-103;

(F) Battery in the first degree, § 5-13-201; or

(G) Terroristic act, § 5-13-310.

II. LWOP PROVISIONS

ARK. CODE ANN. § 5-4-104. Punishment and sentences.

....

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-601--5-4-605, 5-4-607, and 5-4-608.

....

(f)(1) If the court determines that an offender under eighteen (18) years of age would be more amenable to a rehabilitation program of the Division of Youth Services of the Department of Human Services and that he or she previously has not been committed to the division on more than one (1) occasion, the court may sentence the offender under eighteen (18) years of age to the Department of Correction for a term of years, suspend the sentence, and commit him or her to the custody of the division.

(2) In a case under subdivision (f)(1) of this section, if the offender under eighteen (18) years of age completes the program of the division satisfactorily, the division shall return him or her to the sentencing court and provide the sentencing court with a written report of his or her progress and a recommendation that the offender under eighteen (18) years of age be placed on probation.

(3)(A) In the event that the offender under eighteen (18) years of age violate a rule of the

division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the division may return him or her to the sentencing court with a written report of his or her conduct and a recommendation that the offender under eighteen (18) years of age be transferred to the Department of Correction.

(B) If the court finds that the offender under eighteen (18) years of age has violated a rule of the division's program or facility or is otherwise not amenable to the division's rehabilitative effort, the court shall then revoke the suspension of the sentence originally imposed and commit the offender under eighteen (18) years of age to the Department of Correction.

CALIFORNIA

I. JUVENILE TRANSFER PROVISIONS

CAL. WELF. & INST. CODE § 602. Minors violating laws defining crime; ward of court.

....

(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction:

(1) Murder, as described in Section 187 of the Penal Code, if one of the circumstances enumerated in subdivision (a) of Section 190.2 of the Penal Code is alleged by the prosecutor, and the prosecutor alleges that the minor personally killed the victim.

....

II. LWOP PROVISIONS

CAL. PENAL CODE § 190.5. Penalty for persons under 18; imposition of death penalty prohibited.

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in

Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.

COLORADO

I. JUVENILE TRANSFER PROVISIONS

COLO. REV. STAT. ANN. § 19-2-517. Direct filing.

(1) A juvenile may be charged by the direct filing of information in the district court or by indictment only if:

. . .

(b) The juvenile is fourteen or fifteen years of age at the time of the commission of the alleged offense and:

(I) Is alleged to have committed murder in the first degree, as described in section 18-3-102, C.R.S., or murder in the second degree, as described in section 18-3-103, C.R.S.; or

....

II. LWOP PROVISIONS

COLO. REV. STAT. ANN. § 17-22.5-104. Parole—regulations.

....

(d)(I) No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life sentence pursuant to section 16-13-101(2), C.R.S., as it existed prior to July 1, 1993, for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no

application for parole shall be made or considered during such period of forty years.

....

(IV) Notwithstanding the provisions of subparagraph (I) of this paragraph (d), an inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 2006, who was convicted as an adult following direct filing of an information or indictment in the district court pursuant to section 19-2-517, C.R.S., or transfer of proceedings to the district court pursuant to section 19-2-518, C.R.S., may be eligible for parole after the inmate has served at least forty calendar years. An application for parole shall not be made or considered during the period of forty calendar years.

....

CONNECTICUT

I. JUVENILE TRANSFER PROVISIONS

CONN. GEN. STAT. ANN. § 46b-127. Transfer of child charged with a felony to the regular criminal docket. Transfer of youth age sixteen to docket for juvenile matters.

(a) The court shall automatically transfer from the docket for juvenile matters to the regular criminal docket of the Superior Court the case of any child charged with the commission of a capital felony, a class A or B felony or a violation of section 53a-54d, provided such offense was committed after such child attained the age of fourteen years and counsel has been appointed for such child if such child is indigent. . . .

....

II. LWOP PROVISIONS

CONN. GEN. STAT. ANN. § 53a-35a. Imprisonment for felony committed on or after July 1, 1981. Definite sentence. Authorized term.

For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines the crime specifically provides otherwise, the term shall be fixed by the court as follows: (1) For a capital felony, a term of life imprisonment without the possibility of release unless a sentence of death is imposed in accordance with section 53a-46a; . . . .

CONN. GEN. STAT. ANN. § 53a-46a. Imposition of sentence for capital felony. Hearing. Special verdict. Mitigating and aggravating factors. Factors barring death sentence.

....

(h) The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that at the time of the offense (1) the defendant was under the age of eighteen years, or (2) the defendant was a person with intellectual disability, as defined in section 1-1g, or (3) the defendant's mental capacity was significantly impaired or the defendant's ability to conform the defendant's conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution, or (4) the defendant was criminally liable under sections 53a-8, 53a-9 and 53a-10 for the offense, which was committed by another, but the defendant's participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution, or (5) the defendant could not reasonably have foreseen that the defendant's conduct in the course of commission of the offense of which the defendant was convicted would cause, or would create a grave risk of causing, death to another person.

....

DELAWARE

I. JUVENILE TRANSFER PROVISIONS

DEL. CODE ANN. tit. 10, § 1010. Proceeding against child as an adult; amenability proceeding; referral to another court.

(a) A child shall be proceeded against as an adult where:

> (1) The acts alleged to have been committed constitute first or second degree murder, rape in the first degree or rape in the second degree, assault in the first degree, robbery in the first degree (where such offense involves the display of what appears to be a deadly weapon or involves the representation by word or conduct that the person was in possession or control of a deadly weapon or involves the infliction of serious physical injury upon any person who was not a participant in the crime and where the child has previously been adjudicated delinquent of 1 or more offenses which would constitute a felony were the child charged under the laws of this State) or kidnapping in the first degree, or any attempt to commit said crimes;
>
> ....

II. LWOP PROVISIONS

DEL. CODE ANN. tit. 11, § 4209. Punishment, procedure for determining punishment, review of punishment and method of punishment for first-degree murder.

(a) *Punishment for first-degree murder.*--Any person who is convicted of first-degree murder shall be punished by death or by imprisonment for the remainder of the person's natural life without benefit of probation or parole or any other reduction, said penalty to be determined in accordance with this section.

DISTRICT OF COLUMBIA

I. JUVENILE TRANSFER PROVISIONS

D.C. CODE ANN. § 16-2307. Transfer for criminal prosecution.

(a) Within twenty-one days (excluding Sundays and legal holidays) of the filing of a delinquency petition, or later for good cause shown, and prior to a fact finding hearing on the petition, the Corporation Counsel may file a motion, supported by a statement of facts, requesting transfer of the child for criminal prosecution, if-

(1) the child was fifteen or more years of age at the time of the conduct charged, and is alleged to have committed an act which would constitute a felony if committed by an adult;

....

II. LWOP PROVISIONS

D.C. CODE ANN. § 22-2104. Penalty for murder in first and second degrees.

(a) The punishment for murder in the first degree shall be not less than 30 years nor more than life imprisonment without release, except that the court may impose a prison sentence in excess of 60 years only in accordance with § 22-2104.01 or § 24-403.01(b-2). The prosecution shall notify the defendant in writing at least 30 days prior to trial that it intends to seek a sentence of life imprisonment without release as provided in § 22-

2104.01; provided that, no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without release.

....

D.C. CODE ANN. § 22-2106. Murder of law enforcement officer.

(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer or public safety employee, kills any law enforcement officer or public safety employee engaged in, or on account of, the performance of such officer's or employee's official duties, is guilty of murder of a law enforcement officer or public safety employee, and shall be sentenced to life without the possibility of release. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person.

....

FLORIDA

I. JUVENILE TRANSFER PROVISIONS

FLA. STAT. ANN. § 985.56. Indictment of a juvenile.

(1) A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the court as set forth in s. 985.0301(2) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult:

(a) On the offense punishable by death or by life imprisonment . . .

....

II. LWOP PROVISIONS

FLA. STAT. ANN. § 775.082. Penalties; applicability of sentencing structures; mandatory minimum sentences for certain reoffenders previously released from prison.

(1) A person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

GEORGIA

I. JUVENILE TRANSFER PROVISIONS

GA. CODE ANN. § 15-11-28. Jurisdiction over juveniles.

....

(b) *Criminal jurisdiction.*

(1) Except as provided in paragraph (2) of this subsection, the court shall have concurrent jurisdiction with the superior court over a child who is alleged to have committed a delinquent act which would be considered a crime if tried in a superior court and for which the child may be punished by loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution.

(2)(A) The superior court shall have exclusive jurisdiction over the trial of any child 13 to 17 years of age who is alleged to have committed any of the following offenses:

(i) Murder;

....

II. LWOP PROVISIONS

GA. CODE ANN. § 17-10-31. Capital felonies; jury verdict and sentence.

(a) Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed

unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the accused to death. Where a statutory aggravating circumstance is not found or where a statutory circumstance is found but a recommendation of death is not made, the jury shall decide whether to recommend a sentence of life imprisonment without parole or life imprisonment with the possibility of parole. . . .

....

HAWAII

I. JUVENILE TRANSFER PROVISIONS

HAW. REV. STAT. § 571-22. Waiver of jurisdiction; transfer to other courts.

....

(b) The court may waive jurisdiction and order a minor or adult held for criminal proceedings if, after a full investigation and hearing, the court finds that:

(1) The person during the person's minority, but on or after the person's fourteenth birthday, is alleged to have committed an act that would constitute a felony if committed by an adult and either:

(A) The act resulted in serious bodily injury to a victim;

(B) The act would constitute a class A felony if committed by an adult; or

(C) The person has more than one prior adjudication for acts that would constitute felonies if committed by an adult; and

(2) There is no evidence the person is committable to an institution for individuals with intellectual disabilities or the mentally ill.

....

(d) The court may waive jurisdiction and order a minor or adult held for criminal proceedings if,

after a full investigation and hearing, the court finds that:

(1) The person during the person's minority is alleged to have committed an act that would constitute murder in the first degree or second degree or attempted murder in the first degree or second degree if committed by an adult; and

(2) There is no evidence the person is committable to an institution for individuals with intellectual disabilities or the mentally ill.

....

II. LWOP PROVISIONS

HAW. REV. STAT. § 706-656. Terms of imprisonment for first and second degree murder and attempted first and second degree murder.

(1) Persons convicted of first degree murder or first degree attempted murder shall be sentenced to life imprisonment without possibility of parole.

As part of such sentence the court shall order the director of public safety and the Hawaii paroling authority to prepare an application for the governor to commute the sentence to life imprisonment with parole at the end of twenty years of imprisonment; provided that persons who are repeat offenders under section 706-606.5 shall serve at least the applicable mandatory minimum term of imprisonment.

....

HAW. REV. STAT. § 706-667. Young adult defendants.

(1) Defined. A young adult defendant is a person convicted of a crime who, at the time of the offense, is less than twenty-two years of age and who has not been previously convicted of a felony as an adult or adjudicated as a juvenile for an offense that would have constituted a felony had the young adult defendant been an adult.

(2) Specialized correctional treatment. A young adult defendant who is sentenced to a term of imprisonment exceeding thirty days may be committed by the court to the custody of the department of public safety and shall receive, as far as practicable, such special and individualized correctional and rehabilitative treatment as may be appropriate to the young adult defendant's needs.

(3) Special term. A young adult defendant convicted of a felony, in lieu of any other sentence of imprisonment authorized by this chapter, may be sentenced to a special indeterminate term of imprisonment if the court is of the opinion that such special term is adequate for the young adult defendant's correction and rehabilitation and will not jeopardize the protection of the public. When ordering a special indeterminate term of imprisonment, the court shall impose the maximum length of imprisonment, which shall be eight years for a class A felony, five years for a class B felony, and four years for a class C felony. The minimum length of imprisonment shall be set by the Hawaii paroling authority in accordance

with section 706-669. During this special indeterminate term, the young adult shall be incarcerated separately from career criminals, when practicable.

This section shall not apply to the offenses of murder or attempted murder.

IDAHO

I. JUVENILE TRANSFER PROVISIONS

IDAHO CODE ANN. § 20-509. Violent offenses, controlled substances violations near schools and offenders.

(1) Any juvenile, age fourteen (14) years to age eighteen (18) years, who is alleged to have committed any of the following crimes or any person under age fourteen (14) years who is alleged to have committed any of the following crimes and, pursuant to section 20-508, Idaho Code, has been ordered by the court to be held for adult criminal proceedings:

(a) Murder of any degree or attempted murder;

(b) Robbery;

(c) Rape as defined in section 18-6101, Idaho Code;

(d) Male rape as defined in section 18-6108, Idaho Code;

(e) Forcible sexual penetration by the use of a foreign object;

(f) Infamous crimes against nature, committed by force or violence;

(g) Mayhem;

(h) Assault or battery with the intent to commit any of the above serious felonies;

(i) A violation of the provisions of section 37-2732(a)(1)(A), (B) or (C), Idaho Code, when the violation occurred on or within one thousand (1,000) feet of the property of any public or private primary or secondary school, or in those portions of any building, park, stadium or other structure or grounds which were, at the time of the violation, being used for an activity sponsored by or through such a school;

(j) Arson in the first degree and aggravated arson;

shall be charged, arrested and proceeded against by complaint, indictment or information as an adult ...

....

II. LWOP PROVISIONS

IDAHO CODE ANN. § 18-4004. Punishment for murder.

Subject to the provisions of sections 19-2515 and 19-2515A, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment for life, provided that a sentence of death shall not be imposed unless the prosecuting attorney filed written notice of intent to seek the death penalty as required under the provisions of section 18-4004A, Idaho Code, and provided further that whenever the death penalty is not imposed the court shall impose a sentence. If a jury, or the court if a jury is waived, finds a

statutory aggravating circumstance beyond a reasonable doubt but finds that the imposition of the death penalty would be unjust, the court shall impose a fixed life sentence. If a jury, or the court if a jury is waived, does not find a statutory aggravating circumstance beyond a reasonable doubt or if the death penalty is not sought, the court shall impose a life sentence with a minimum period of confinement of not less than ten (10) years during which period of confinement the offender shall not be eligible for parole or discharge or credit or reduction of sentence for good conduct, except for meritorious service. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.

ILLINOIS

I. JUVENILE TRANSFER PROVISIONS

705 ILL. COMP. STAT. ANN. 405/5-130. Exclude jurisdiction.

(1)(a) The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault, (iii) aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05 where the minor personally discharged a firearm as defined in Section 2-15.5 of the Criminal Code of 1961, (iv) armed robbery when the armed robbery was committed with a firearm, or (v) aggravated vehicular hijacking when the hijacking was committed with a firearm.

These charges and all other charges arising out of the same incident shall be prosecuted under the criminal laws of this State.

....

II. LWOP PROVISIONS

730 ILL. COMP. STAT. ANN. 5/5-8-1. Natural life imprisonment; enhancements for use of a firearm; mandatory supervised release terms.

....

(1) for first degree murder,

....

(c) the court shall sentence the defendant to a term of natural life imprisonment when the death penalty is not imposed if the defendant,

(i) has previously been convicted of first degree murder under any state or federal law, or

(ii) is a person who, at the time of the commission of the murder, had attained the age of 17 or more and is found guilty of murdering an individual under 12 years of age; or, irrespective of the defendant's age at the time of the commission of the offense, is found guilty of murdering more than one victim, or

....

(vi) is a person who, at the time of the commission of the murder, had not attained the age of 17, and is found guilty of murdering a person under 12 years of age and the murder is committed during the course of aggravated criminal sexual assault, criminal sexual assault, or aggravated kidnapping, . . .

INDIANA

I. JUVENILE TRANSFER PROVISIONS

IND. CODE ANN. § 31-30-3-4. Act that would be murder.

Upon motion of the prosecuting attorney and after full investigation and hearing, the juvenile court shall waive jurisdiction if it finds that:

(1) the child is charged with an act that would be murder if committed by an adult;

(2) there is probable cause to believe that the child has committed the act; and

(3) the child was at least ten (10) years of age when the act charged was allegedly committed;

unless it would be in the child and of the safety and welfare of the community for the child to remain within the juvenile justice system.

IND. CODE ANN. § 31-30-1-4. Juvenile court lacks jurisdiction over individuals at least 16 years old committing certain felonies; retention of jurisdiction by court having adult criminal jurisdiction.

(a) The juvenile court does not have jurisdiction over an individual for an alleged violation of:

(1) IC 35-41-5-1(a) (attempted murder);

(2) IC 35-42-1-1 (murder);

....

if the individual was at least sixteen (16) years of age at the time of the alleged violation.

II. LWOP PROVISIONS

IND. CODE ANN. § 35-50-2-3. Murder.

(a) A person who commits murder shall be imprisoned for a fixed term of between forty-five (45) and sixty-five (65) years, with the advisory sentence being fifty-five (55) years. In addition, the person may be fined not more than ten thousand dollars ($10,000).

(b) Notwithstanding subsection (a), a person who was:

(1) at least eighteen (18) years of age at the time the murder was committed may be sentenced to:

(A) death; or

(B) life imprisonment without parole; and

(2) at least sixteen (16) years of age but less than eighteen (18) years of age at the time the murder was committed may be sentenced to life imprisonment without parole;

under section 9 of this chapter unless a court determines under IC 35-36-9 that the person is an individual with mental retardation.

IOWA

I. JUVENILE TRANSFER PROVISIONS

IOWA CODE ANN. § 232.45. Waiver hearing and waiver of jurisdiction.

....

6. At the conclusion of the waiver hearing the court may waive its jurisdiction over the child for the alleged commission of the public offense if all of the following apply:

a. The child is fourteen years of age or older.

b. The court determines, or has previously determined in a detention hearing under section 232.44, that there is probable cause to believe that the child has committed a delinquent act which would constitute the public offense.

c. The court determines that the state has established that there are not reasonable prospects for rehabilitating the child if the juvenile court retains jurisdiction over the child and the child is adjudicated to have committed the delinquent act, and that waiver of the court's jurisdiction over the child for the alleged commission of the public offense would be in the best interests of the child and the community.

II. LWOP PROVISIONS

IOWA CODE ANN. § 902.1. Class "A" Felony.

1. Upon a plea of guilty, a verdict of guilty, or a special verdict upon which a judgment of conviction of a class "A" felony may be rendered, the court shall enter a judgment of conviction and shall commit the defendant into the custody of the director of the Iowa department of corrections for the rest of the defendant's life. Nothing in the Iowa corrections code pertaining to deferred judgment, deferred sentence, suspended sentence, or reconsideration of sentence applies to a class "A" felony, and a person convicted of a class "A" felony shall not be released on parole unless the governor commutes the sentence to a term of years.

2. a. Notwithstanding subsection 1, a person convicted of a class "A" felony, and who was under the age of eighteen at the time the offense was committed shall be eligible for parole after serving a minimum term of confinement of twenty-five years.

b. If a person is paroled pursuant to this subsection the person shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and chapter 908, and rules adopted under those chapters for persons on parole.

c. A person convicted of murder in the first degree in violation of section 707.2 shall not be eligible for parole pursuant to this subsection.

KANSAS

I. JUVENILE TRANSFER PROVISIONS

KAN. STAT. ANN. § 38-2347. Prosecution as an adult; extended jurisdiction juvenile prosecution; burden of proof; authorization.

....

(a)(2) The alleged juvenile offender shall be presumed to be an adult if the alleged juvenile offender was: (A) 14, 15, 16 or 17 years of age at the time of the offense or offenses alleged in the complaint, if any such offense: (i) If committed by an adult, would constitute an off-grid crime, a person felony, a nondrug severity level 1 through 6 felony or any drug severity level 1, 2 or 3 felony; or (ii) was committed while in possession of a firearm; or (B) charged with a felony or with more than one offense, one or more of which constitutes a felony, after having been adjudicated or convicted in a separate juvenile proceeding as having committed an offense which would constitute a felony if committed by an adult and the adjudications or convictions occurred prior to the date of the commission of the new act charged and prior to the beginning of an evidentiary hearing at which the court may enter a sentence as provided in K.S.A. 38-2356, and amendments thereto. If the juvenile is presumed to be an adult, the burden is on the juvenile to rebut the presumption by a preponderance of the evidence.

....

(f)(1) The court may authorize prosecution as an adult upon completion of the hearing if the court

finds from a preponderance of the evidence that the alleged juvenile offender should be prosecuted as an adult for the offense charged. In that case, the court shall direct the alleged juvenile offender be prosecuted under the applicable criminal statute and that the proceedings filed under this code be dismissed.

....

II. LWOP PROVISIONS

KAN. STAT. ANN. § 21-6618. Capital murder; sentencing.

Upon conviction of a defendant of capital murder and a finding that the defendant was less than 18 years of age at the time of the commission thereof, the court shall sentence the defendant as otherwise provided by law, and no sentence of death or life without the possibility of parole shall be imposed hereunder.

KAN. STAT. ANN. § 21-6620. Sentencing of certain persons to mandatory term of imprisonment of 40 or 50 years or life without the possibility of parole; determination; evidence presented; balance of aggravating and mitigating circumstances.

....

(b) If a defendant is convicted of murder in the first degree based upon the finding of premeditated murder, the court shall determine whether the

defendant shall be required to serve a mandatory term of imprisonment of 40 years or for crimes committed on and after July 1, 1999, a mandatory term of imprisonment of 50 years or sentenced as otherwise provided by law.

....

(d) If the court finds that one or more of the aggravating circumstances enumerated in K.S.A. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced pursuant to K.S.A. 21-6623, and amendments thereto; otherwise, the defendant shall be sentenced as provided by law. The court shall designate, in writing, the statutory aggravating circumstances which it found. The court may make the findings required by this subsection for the purpose of determining whether to sentence a defendant pursuant to section K.S.A. 21-6623, and amendments thereto, notwithstanding contrary findings made by the jury or court pursuant to subsection (e) of K.S.A. 21-6617, and amendments thereto, for the purpose of determining whether to sentence such defendant to death.

KAN. STAT. ANN. § 21-6621. Sentencing of certain persons to mandatory term of imprisonment of 40 years; juveniles prosecuted as adults.

If the court authorizes prosecution as an adult of a juvenile pursuant to K.S.A. 38-2347, and amendments thereto, the county or district

attorney may proceed pursuant to K.S.A. 21-6620, 21-6622, 21-6623, 21-6624 and 21-6625, and amendments thereto.

KAN. STAT. ANN. § 21-6623. Imposition of sentence of mandatory imprisonment of 40 or 50 years.

When it is provided by law that a person shall be sentenced pursuant to this section, such person shall be sentenced to imprisonment for life and shall not be eligible for probation or suspension, modification or reduction of sentence. Except as otherwise provided, in addition, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 40 years' imprisonment, and such 40 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on and after July 1, 1999, a person sentenced pursuant to this section shall not be eligible for parole prior to serving 50 years' imprisonment, and such 50 years' imprisonment shall not be reduced by the application of good time credits. For crimes committed on or after July 1, 2006, a mandatory minimum term of imprisonment of 50 years shall not apply if the court finds that the defendant, because of the defendant's criminal history classification, is subject to presumptive imprisonment pursuant to the sentencing guidelines grid for nondrug crimes and the sentencing range exceeds 600 months. In such case, the defendant is required to serve a mandatory minimum term equal to the sentence established pursuant to the sentencing range. Upon sentencing

a defendant pursuant to this section, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced pursuant to K.S.A. 21-6623, and amendments thereto.

KENTUCKY

I. JUVENILE TRANSFER PROVISIONS

KY. REV. STAT. ANN. § 635.020. Criteria for determining how child is to be tried.

....

(2) If a child charged with a capital offense, Class A felony, or Class B felony, had attained age fourteen (14) at the time of the alleged commission of the offense, the court shall, upon motion of the county attorney made prior to adjudication, and after the county attorney has consulted with the Commonwealth's attorney, that the child be proceeded against as a youthful offender, proceed in accordance with the provisions of KRS 640.010.

....

KY. REV. STAT. ANN. § 640.010. Preliminary hearing; proof required to try child as youthful offender in Circuit Court.

....

(2) In the case of a child alleged to be a youthful offender by falling within the purview of KRS 635.020(2), (3), (5), (6), (7), or (8), the District Court shall, upon motion by the county attorney to proceed under this chapter, and after the county attorney has consulted with the Commonwealth's attorney, conduct a preliminary hearing to determine if the child should be transferred to Circuit Court as a youthful offender. The preliminary hearing shall be conducted in accordance with the Rules of Criminal Procedure.

....

II. LWOP PROVISIONS

KY. REV. STAT. ANN. § 640.040. Capital punishment and other prohibited dispositions.

(1) No youthful offender who has been convicted of a capital offense who was under the age of sixteen (16) years at the time of the commission of the offense shall be sentenced to capital punishment. A youthful offender may be sentenced to capital punishment if he was sixteen (16) years of age or older at the time of the commission of the offense. A youthful offender convicted of a capital offense regardless of age may be sentenced to a term of imprisonment appropriate for one who has committed a Class A felony and may be sentenced to life imprisonment without benefit of parole for twenty-five (25) years.

(2) No youthful offender shall be subject to persistent felony offender sentencing under the provisions of KRS 532.080 for offenses committed before the age of eighteen (18) years.

(3) No youthful offender shall be subject to limitations on probation, parole or conditional discharge as provided for in KRS 533.060.

(4) Any youthful offender convicted of a misdemeanor or any felony offense which would exempt him from KRS 635.020(2), (3), (4), (5), (6), (7), or (8) shall be disposed of by the Circuit Court in accordance with the provisions of KRS 635.060.

LOUISIANA

I. JUVENILE TRANSFER PROVISIONS

LA. CHILD. CODE ANN. art. 305. Divestiture of juvenile court jurisdiction; original criminal court jurisdiction over children; when acquired.

A. (1) When a child is fifteen years of age or older at the time of the commission of first degree murder, second degree murder, aggravated rape, or aggravated kidnapping, he is subject to the exclusive jurisdiction of the juvenile court until either:

(a) An indictment charging one of these offenses is returned.

(b) The juvenile court holds a continued custody hearing pursuant to Articles 819 and 820 and finds probable cause that he committed one of these offenses, whichever occurs first. During this hearing, when the child is charged with aggravated rape, the court shall inform him that if convicted he shall register as a sex offender for life, pursuant to Chapter 3-B of Title 15 of the Louisiana Revised Statutes of 1950.

(2) Thereafter, the child is subject to the exclusive jurisdiction of the appropriate court exercising criminal jurisdiction for all subsequent procedures, including the review of bail applications, and the child shall be transferred

forthwith to the appropriate adult facility for detention prior to his trial as an adult.

....

LA. CHILD. CODE ANN. art. 857. Transfers for criminal prosecution; authority.

A. The court on its own motion or on motion of the district attorney may conduct a hearing to consider whether to transfer a child for prosecution to the appropriate court exercising criminal jurisdiction if a delinquency petition has been filed which alleges that a child who is fourteen years of age or older at the time of the commission of the alleged offense but is not otherwise subject to the original jurisdiction of a court exercising criminal jurisdiction has committed any one or more of the following crimes:

(1) First degree murder.

(2) Second degree murder.

....

B. Notwithstanding any other provision of law to the contrary, a fourteen-year-old who is transferred pursuant to this Article and subsequently convicted shall not be confined for such conviction beyond his thirty-first birthday.

....

II. LWOP PROVISIONS

LA. REV. STAT. ANN. § 14:30. First degree murder.

....

C. Penalty provisions.

(1) If the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C.Cr.P. Art 782 relative to cases in which punishment may be capital shall apply.

(2) If the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The provisions of C. Cr.P. Art 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply.

MAINE

I. JUVENILE TRANSFER PROVISIONS

ME. REV. STAT. ANN. tit. 15, § 3101. Jurisdiction.

....

4. Bind-over.

A. When a petition alleges that a juvenile has committed an act which would be murder or a Class A, B or C crime if committed by an adult, the court shall, upon request of the prosecuting attorney, continue the case for further investigation and for a bind-over hearing to determine whether the jurisdiction of the Juvenile Court over the juvenile should be waived. In the event of such a continuance, the court shall advise the juvenile and his parents, guardian or legal custodian of the possible consequences of a bind-over hearing, the right to be represented by counsel and other constitutional and legal rights in connection therewith.

....

II. LWOP PROVISIONS

ME. REV. STAT. ANN. tit. 17-A, § 1251. Imprisonment for murder.

A person convicted of the crime of murder shall be sentenced to imprisonment for life or for any term of years that is not less than 25. The sentence of the court shall specify the length of the sentence to

be served and shall commit the person to the Department of Corrections.

....

MARYLAND

I. JUVENILE TRANSFER PROVISIONS

MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-03. Jurisdiction of court.

....

Jurisdiction relating to acts punishable by imprisonment or death.

(d) The court does not have jurisdiction over:

(1) A child at least 14 years old alleged to have done an act which, if committed by an adult, would be a crime punishable by death or life imprisonment, as well as all other charges against the child arising out of the same incident, unless an order removing the proceeding to the court has been filed under § 4-202 of the Criminal Procedure Article;

....

II. LWOP PROVISIONS

MD. CODE ANN., CRIM. LAW § 2-202. Murder in the first degree—Sentence of death.

....

(b) (2) A defendant may not be sentenced to death, but shall be sentenced to imprisonment for life without the possibility of parole subject to the requirements of § 2-203(1) of this subtitle or imprisonment for life, if the defendant:

(i) was under the age of 18 years at the time of the murder; or

(ii) proves by a preponderance of the evidence that at the time of the murder the defendant was mentally retarded.

MASSACHUSETTS

I. JUVENILE TRANSFER PROVISIONS

MASS. GEN. LAWS ch. 119, § 74. Limitations on criminal proceedings against children.

....

The juvenile court shall not have jurisdiction over a person who had at the time of the offense attained the age of fourteen but not yet attained the age of seventeen who is charged with committing murder in the first or second degree. Complaints and indictments brought against persons for such offenses, and for other criminal offenses properly joined under Massachusetts Rules of Criminal Procedure 9(a)(1), shall be brought in accordance with the usual course and manner of criminal proceedings.

....

II. LWOP PROVISIONS

MASS. GEN. LAWS ch. 119, § 72B. Persons between the ages of fourteen and seventeen convicted of murder; penalties.

If a person is found guilty of murder in the first degree committed on or after his fourteenth birthday and before his seventeenth birthday under the provisions of section one of chapter two hundred and sixty-five, the superior court shall commit the person to such punishment as is provided by law for the offense.

....

MASS. GEN. LAWS ch. 265, § 2. Punishment for murder; parole; executive clemency.

Whoever is guilty of murder committed with deliberately premeditated malice aforethought or with extreme atrocity or cruelty, and who had attained the age of eighteen years at the time of the murder, may suffer the punishment of death pursuant to the procedures set forth in sections sixty-eight to seventy-one, inclusive, of chapter two hundred and seventy-nine. Any other person who is guilty of murder in the first degree shall be punished by imprisonment in the state prison for life. Whoever is guilty of murder in the second degree shall be punished by imprisonment in state prison for life. No person shall be eligible for parole under section one hundred and thirty-three A of chapter one hundred and twenty-seven while he is serving a life sentence for murder in the first degree, but if his sentence is commuted therefrom by the governor and council under the provisions of section one hundred and fifty-two of said chapter one hundred and twenty-seven he shall thereafter be subject to the provisions of law governing parole for persons sentenced for lesser offenses.

MICHIGAN

I. JUVENILE TRANSFER PROVISIONS

MICH. COMP. LAWS § 712A.2. Family division of circuit court; authority and jurisdiction.

The court has the following authority and jurisdiction:

(a) Exclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following applies:

(1) Except as otherwise provided in this sub-subdivision, the juvenile has violated any municipal ordinance or law of the state or of the United States. If the court enters into an agreement under section 2e of this chapter, the court has jurisdiction over a juvenile who committed a civil infraction as provided in that section. The court has jurisdiction over a juvenile 14 years of age or older who is charged with a specified juvenile violation only if the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant. As used in this sub-subdivision, "specified juvenile violation" means 1 or more of the following:

(A) A violation of section 72, 83, 86, 89, 91, 316, 317, 349, 520b, 529, 529a, or 531 of the Michigan penal code, 1931 PA 328, MCL 750.72, 750.83, 750.86, 750.89, 750.91,

750.316, 750.317, 750.349, 750.520b, 750.529, 750.529a, and 750.531.

....

II. LWOP PROVISIONS

MICH. COMP. LAWS § 750.316. First degree murder; penalty; definitions (footnotes omitted).

(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

(b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under section 145n, torture under section 85, or aggravated stalking under section 411i.

(c) A murder of a peace officer or a corrections officer committed while the peace officer or corrections officer is lawfully engaged in the

performance of any of his or her duties as a peace officer or corrections officer, knowing that the peace officer or corrections officer is a peace officer or corrections officer engaged in the performance of his or her duty as a peace officer or corrections officer.

....

MICH. COMP. LAWS § 791.234. Prisoners subject to parole board jurisdiction; indeterminate sentences; disciplinary time; consecutive sentences; life; public health code offenses; release on parole, procedure and conditions; time of release; review; notice to prosecuting attorney.

....

(6) A prisoner sentenced to imprisonment for life for any of the following is not eligible for parole and is instead subject to the provisions of section 44:

(a) First degree murder in violation of section 316 of the Michigan penal code, 1931 PA 328, MCL 750.316.

....

MINNESOTA

I. JUVENILE TRANSFER PROVISIONS

MINN. STAT. ANN. § 260B.125. Certification.

Subd. 1. Order. When a child is alleged to have committed, after becoming 14 years of age, an offense that would be a felony if committed by an adult, the juvenile court may enter an order certifying the proceeding for action under the laws and court procedures controlling adult criminal violations.

....

MINN. STAT. ANN. § 609.055. Capability of children to commit crime.

Subd. 1. General rule. Children under the age of 14 years are incapable of committing crime.

Subd. 2. Adult prosecution. (a) Except as otherwise provided in paragraph (b), children of the age of 14 years or over but under 18 years may be prosecuted for a felony offense if the alleged violation is duly certified for prosecution under the laws and court procedures controlling adult criminal violations or may be designated an extended jurisdiction juvenile in accordance with the provisions of chapter 260B. A child who is 16 years of age or older but under 18 years of age is capable of committing a crime and may be prosecuted for a felony if:

(1) the child has been previously certified on a felony charge pursuant to a hearing under

section 260B.125, subdivision 2, or pursuant to the waiver of the right to such a hearing, or prosecuted pursuant to this subdivision; and

(2) the child was convicted of the felony offense or offenses for which the child was prosecuted or of a lesser included felony offense.

(b) A child who is alleged to have committed murder in the first degree after becoming 16 years of age is capable of committing a crime and may be prosecuted for the felony. This paragraph does not apply to a child alleged to have committed attempted murder in the first degree after becoming 16 years of age.

II. LWOP PROVISIONS

MINN. STAT. ANN. § 609.185. Murder in the first degree.

(a) Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:

(1) causes the death of a human being with premeditation and with intent to effect the death of the person or of another;

(2) causes the death of a human being while committing or attempting to commit criminal sexual conduct in the first or second degree with force or violence, either upon or affecting the person or another;

....

(4) causes the death of a peace officer or a guard employed at a Minnesota state or local correctional facility, with intent to effect the death of that person or another, while the peace officer or guard is engaged in the performance of official duties; [or]

....

(7) causes the death of a human being while committing, conspiring to commit, or attempting to commit a felony crime to further terrorism and the death occurs under circumstances manifesting an extreme indifference to human life.

....

MINN. STAT. ANN. § 609.106. Heinous Crimes.

....

Subd. 2. Life without release. The court shall sentence a person to life imprisonment without possibility of release under the following circumstances:

(1) the person is convicted of first-degree murder under section 609.185, paragraph (a), clause (1), (2), (4), or (7);

(2) the person is convicted of committing first-degree murder in the course of a kidnapping under section 609.185, clause (3); or

(3) the person is convicted of first-degree murder under section 609.185, clause (3), (5), or (6), and the court determines on the record at

the time of sentencing that the person has one or more previous convictions for a heinous crime.

MISSISSIPPI

I. JUVENILE TRANSFER PROVISIONS

MISS. CODE ANN. § 43-21-157. Transfer to other courts; prospects of rehabilitation.

(1) If a child who has reached his thirteenth birthday is charged by petition to be a delinquent child, the youth court, either on motion of the youth court prosecutor or on the youth court's own motion, after a hearing as hereinafter provided, may, in its discretion, transfer jurisdiction of the alleged offense described in the petition or a lesser included offense to the criminal court which would have trial jurisdiction of such offense if committed by an adult. The child shall be represented by counsel in transfer proceedings.

....

II. LWOP PROVISIONS

MISS. CODE ANN. § 47-7-3. Parole eligibility; earned time; tentative hearing date; program priority.

....

(e) No person shall be eligible for parole who, on or after July 1, 1994, is charged, tried, convicted and sentenced to life imprisonment without eligibility for parole under the provisions of Section 99-19-101;

(f) No person shall be eligible for parole who is charged, tried, convicted and sentenced to life

imprisonment under the provisions of Section 99-19-101; . . .

MISS. CODE ANN. § 97-3-21. Murder and capital murder, punishment.

Every person who shall be convicted of murder shall be sentenced by the court to imprisonment for life in the State Penitentiary.

Every person who shall be convicted of capital murder shall be sentenced (a) to death; (b) to imprisonment for life in the State Penitentiary without parole; or (c) to imprisonment for life in the State Penitentiary with eligibility for parole as provided in Section 47-7-3(1)(f).

MISS. CODE ANN. § 99-19-15. Sentence of minor felon.

When the court shall be satisfied that a person who has been found guilty of a felony not capital is not more than sixteen, the punishment imposed may, in the discretion of the court, be imprisonment in the county jail not exceeding one year, instead of imprisonment in the penitentiary.

MISSOURI

I. JUVENILE TRANSFER PROVISIONS

MO. REV. STAT. § 211.071. Certification of juvenile for trial as adult–procedure–mandatory hearing, certain offenses–misrepresentation of age, effect.

1. If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon its own motion or upon motion by the juvenile officer, the child or the child's custodian, order a hearing and may, in its discretion, dismiss the petition and such child may be transferred to the court of general jurisdiction and prosecuted under the general law; except that if a petition alleges that any child has committed an offense which would be considered first degree murder under section 565.020, RSMo, second degree murder under section 565.021, RSMo, first degree assault under section 565.050, RSMo, forcible rape under section 566.030, RSMo, forcible sodomy under section 566.060, RSMo, first degree robbery under section 569.020, RSMo, or distribution of drugs under section 195.211, RSMo, or has committed two or more prior unrelated offenses which would be felonies if committed by an adult, the court shall order a hearing, and may in its discretion, dismiss the petition and transfer the child to a court of general jurisdiction for prosecution under the general law.

....

II. LWOP PROVISIONS

MO. REV. STAT. § 565.020. First degree murder, penalty--person under sixteen years of age not to receive death penalty.

....

2. Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

MONTANA

I. JUVENILE TRANSFER PROVISIONS

MONT. CODE ANN. § 41-5-206. Filing in district court prior to formal proceedings in youth court.

(1) The county attorney may, in the county attorney's discretion and in accordance with the procedure provided in 46-11-201, file with the district court a motion for leave to file an information in the district court if:

(a) the youth charged was 12 years of age or older at the time of the conduct alleged to be unlawful and the unlawful act would if it had been committed by an adult constitute:

(i) sexual intercourse without consent as defined in 45-5-503;

(ii) deliberate homicide as defined in 45-5-102;

(iii) mitigated deliberate homicide as defined in 45-5-103;

(iv) assault on a peace officer or judicial officer as defined in 45-5-210; or

(v) the attempt, as defined in 45-4-103, of or accountability, as provided in 45-2-301, for either deliberate or mitigated deliberate homicide; or

(b) the youth charged was 16 years of age or older at the time of the conduct alleged to be unlawful and the unlawful act is one or more of the following:

(i) negligent homicide as defined in 45-5-104;

(ii) arson as defined in 45-6-103;

(iii) aggravated assault as defined in 45-5-202;

(iv) sexual assault as provided in 45-5-502(3);

(v) assault with a weapon as defined in 45-5-213;

(vi) robbery as defined in 45-5-401;

(vii) burglary or aggravated burglary as defined in 45-6-204;

(viii) aggravated kidnapping as defined in 45-5-303;

(ix) possession of explosives as defined in 45-8-335;

(x) criminal distribution of dangerous drugs as defined in 45-9-101;

(xi) criminal possession of dangerous drugs as defined in 45-9-102(4) through (6);

(xii) criminal possession with intent to distribute as defined in 45-9-103(1);

(xiii) criminal production or manufacture of dangerous drugs as defined in 45-9-110;

(xiv) use of threat to coerce criminal street gang membership or use of violence to coerce criminal street gang membership as defined in 45-8-403;

(xv) escape as defined in 45-7-306;

(xvi) attempt, as defined in 45-4-103, of or accountability, as provided in 45-2-301, for any

of the acts enumerated in subsections (1)(b)(i) through (1)(b)(xv).

(2) The county attorney shall file with the district court a petition for leave to file an information in district court if the youth was 17 years of age at the time the youth committed an offense listed under subsection (1).

II. LWOP PROVISIONS

MONT. CODE ANN. § 45-5-102. Deliberate homicide.

(1) A person commits the offense of deliberate homicide if:

(a) the person purposely or knowingly causes the death of another human being; or

(b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in 46-18-301 through 46-18-310, unless the person is

less than 18 years of age at the time of the commission of the offense, by life imprisonment, or by imprisonment in the state prison for a term of not less than 10 years or more than 100 years, except as provided in 46-18-219 and 46-18-222.

MONT. CODE ANN. § 46-18-222. Exceptions to mandatory minimum sentences, restrictions on deferred imposition and suspended execution of sentence, and restrictions on parole eligibility.

Mandatory minimum sentences prescribed by the laws of this state, mandatory life sentences prescribed by 46-18-219, the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(1)(b), 46-18-205, 46-18-221(3), 46-18-224, and 46-18-502(3), and restrictions on parole eligibility do not apply if:

(1) the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced; . . .

....

NEBRASKA

I. JUVENILE TRANSFER PROVISIONS

NEB. REV. STAT. § 43-247. Juvenile court; jurisdiction.

The juvenile court shall have exclusive original jurisdiction as to any juvenile defined in subdivision (1) of this section who is under the age of sixteen, as to any juvenile defined in subdivision (3) of this section, and as to the parties and proceedings provided in subdivisions (5), (6), and (8) of this section. As used in this section, all references to the juvenile's age shall be the age at the time the act which occasioned the juvenile court action occurred. The juvenile court shall have concurrent original jurisdiction with the district court as to any juvenile defined in subdivision (2) of this section. The juvenile court shall have concurrent original jurisdiction with the district court and county court as to any juvenile defined in subdivision (1) of this section who is age sixteen or seventeen, any juvenile defined in subdivision (4) of this section, and any proceeding under subdivision (7) or (11) of this section. The juvenile court shall have concurrent original jurisdiction with the county court as to any proceeding under subdivision (9) or (10) of this section. Notwithstanding any disposition entered by the juvenile court under the Nebraska Juvenile Code, the juvenile court's jurisdiction over any individual adjudged to be within the provisions of this section shall continue until the individual reaches the age

of majority or the court otherwise discharges the individual from its jurisdiction.

The juvenile court in each county as herein provided shall have jurisdiction of:

....

(2) Any juvenile who has committed an act which would constitute a felony under the laws of this state;

....

II. LWOP PROVISIONS

NEB. REV. STAT. § 28-105.01. Death penalty imposition; restriction on person under eighteen years; restriction on person with mental retardation; sentencing procedure.

(1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

....

NEB. REV. STAT. § 29-2522. Sentence; considerations; determination; contents.

The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment. . . .

NEVADA

I. JUVENILE TRANSFER PROVISIONS

NEV. REV. STAT. § 62B.330. Child alleged or adjudicated to have committed delinquent act; acts deemed not to be delinquent.

1. Except as otherwise provided in this title, the juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act.

2. For the purposes of this section, a child commits a delinquent act if the child:

(a) Violates a county or municipal ordinance;

(b) Violates any rule or regulation having the force of law; or

(c) Commits an act designated a criminal offense pursuant to the laws of the State of Nevada.

3. For the purposes of this section, each of the following acts shall be deemed not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:

(a) Murder or attempted murder and any other related offense arising out of the same facts as the murder or attempted murder, regardless of the nature of the related offense.

II. LWOP PROVISIONS

NEV. REV. STAT. § 200.030. Degrees of murder; penalties.

....

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances, unless a court has made a finding pursuant to NRS 174.098 that the defendant is a person with mental retardation and has stricken the notice of intent to seek the death penalty; or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

NEV. REV. STAT. § 176.025 (as amended by Nev. Sess. Law Ch. 12, A.B. No. 134 (Mar. 30, 2011). Sentence of death not to be imposed on person under age of 18 years.

A sentence of death must not be imposed or inflicted upon any person convicted of a crime now punishable by death who at the time of the commission of the crime less than 18 years of age. As to such person, the maximum punishment that may be imposed is life imprisonment without the possibility of parole.

NEW HAMPSHIRE

I. JUVENILE TRANSFER PROVISIONS

N.H. REV. STAT. ANN. § 628:1. Immaturity.

I. Except as provided in paragraph II, a person less than 15 years old is not criminally responsible for his conduct, but may be adjudged to be a juvenile delinquent.

II. Except as provided in paragraph III, a person 13 years of age or older may be held criminally responsible for the following offenses if the person's case is transferred to the superior court under the provisions of RSA 169-B:24:

(a) (1) First degree murder as defined in RSA 630:1-a. . . .

....

N.H. REV. STAT. ANN. § 169-B:24. Transfer to Superior Court.

I. All cases before the court in which the offense complained of constitutes a felony or would amount to a felony in the case of an adult may be transferred to the superior court prior to hearing under RSA 169-B:16 as provided in this section.

....

IV. When the felony offense charged is first degree murder, second degree murder, attempted murder, manslaughter, first degree assault, second degree assault (except when the allegation is a violation of RSA 631:2, I(d)), aggravated felonious sexual assault, kidnapping, criminal restraint, robbery

punishable as a class A felony, a violation of RSA 318-B:26, I(a) or (b), or negligent homicide under RSA 630:3, II, or when the minor is charged with any felony and, prior to the filing of the felony petition, the minor has been petitioned to the court on 4 or more occasions and adjudicated delinquent in 4 separate adjudicatory hearings which alleged misdemeanor or felony offenses, and the minor commits the act after the minor's fifteenth birthday, there shall be a presumption that the factors listed in RSA 169-B:24, I support transfer to the superior court.

II. LWOP PROVISIONS

N.H. REV. STAT. ANN. § 630:1-a. First degree murder.

....

III. A person convicted of a murder in the first degree shall be sentenced to life imprisonment and shall not be eligible for parole at any time.

NEW JERSEY

I. JUVENILE TRANSFER PROVISIONS

N.J. STAT. ANN. § 2A:4A-26. Referral to another court without juvenile's consent.

a. On motion of the prosecutor, the court shall, without the consent of the juvenile, waive jurisdiction over a case and refer that case from the Superior Court, Chancery Division, Family Part to the appropriate court and prosecuting authority having jurisdiction if it finds, after hearing, that:

(1) The juvenile was 14 years of age or older at the time of the charged delinquent act; and

(2) There is probable cause to believe that the juvenile committed a delinquent act or acts which if committed by an adult would constitute:

(a) Criminal homicide other than death by auto, strict liability for drug induced deaths, pursuant to N.J.S.2C:35-9, robbery which would constitute a crime of the first degree, carjacking, aggravated sexual assault, sexual assault, aggravated assault which would constitute a crime of the second degree, kidnapping, aggravated arson, or gang criminality pursuant to section 1 of P.L.2007, c. 341 (C.2C:33-29) where the underlying crime is enumerated in this subparagraph or promotion of organized street crime pursuant to section 2 of P.L.2007, c. 341 (C.2C:33-30) which would constitute a crime of the first or

second degree which is enumerated in this subparagraph

....

e. If the juvenile can show that the probability of his rehabilitation by the use of the procedures, services and facilities available to the court prior to the juvenile reaching the age of 19 substantially outweighs the reasons for waiver, waiver shall not be granted. This subsection shall not apply with respect to a juvenile 16 years of age or older who is charged with committing any of the acts enumerated in subparagraph (a), (i) or (j) of paragraph (2) of subsection a. of this section or with respect to a violation of N.J.S.2C:35-3, N.J.S.2C:35-4 or section 1 of P.L.1998, c. 26 (C. 2C:39-4.1).

....

II. LWOP Provisions

N.J. Stat. Ann. § 2C:11-3. Murder.

....

b.(1) Murder is a crime of the first degree but a person convicted of murder shall be sentenced, except as provided in paragraphs (2), (3) and (4) of this subsection, by the court to a term of 30 years, during which the person shall not be eligible for parole, or be sentenced to a specific term of years which shall be between 30 years and life imprisonment of which the person shall serve 30 years before being eligible for parole.

(2) If the victim was a law enforcement officer and was murdered while performing his official duties or was murdered because of his status as a law enforcement officer, the person convicted of that murder shall be sentenced by the court to a term of life imprisonment, during which the person shall not be eligible for parole.

(3) A person convicted of murder shall be sentenced to a term of life imprisonment without eligibility for parole if the murder was committed under all of the following circumstances:

(a) The victim is less than 14 years old; and

(b) The act is committed in the course of the commission, whether alone or with one or more persons, of a violation of N.J.S.2C:14-2 or N.J.S.2C:14-3

....

(5) A juvenile who has been tried as an adult and convicted of murder shall be sentenced pursuant to paragraph (1), (2) or (3) of this subsection.

....

NEW MEXICO

I. JUVENILE TRANSFER PROVISIONS

N.M. STAT. ANN. § 32A-2-3. Definitions.

....

J. "youthful offender" means a delinquent child subject to adult or juvenile sanctions who is:

(1) fourteen to eighteen years of age at the time of the offense and who is adjudicated for at least one of the following offenses:

(a) second degree murder, as provided in Section 30-2-1 NMSA 1978;

(b) assault with intent to commit a violent felony, as provided in Section 30-3-3 NMSA 1978;

(c) kidnapping, as provided in Section 30-4-1 NMSA 1978;

(d) aggravated battery, as provided in Subsection C of Section 30-3-5 NMSA 1978;

(e) aggravated battery against a household member, as provided in Subsection C of Section 30-3-16 NMSA 1978;

(f) aggravated battery upon a peace officer, as provided in Subsection C of Section 30-22-25 NMSA 1978;

(g) shooting at a dwelling or occupied building or shooting at or from a motor vehicle, as provided in Section 30-3-8 NMSA 1978;

(h) dangerous use of explosives, as provided in Section 30-7-5 NMSA 1978;

(i) criminal sexual penetration, as provided in Section 30-9-11 NMSA 1978;

(j) robbery, as provided in Section 30-16-2 NMSA 1978;

(k) aggravated burglary, as provided in Section 30-16-4 NMSA 1978;

(l) aggravated arson, as provided in Section 30-17-6 NMSA 1978; or

(m) abuse of a child that results in great bodily harm or death to the child, as provided in Section 30-6-1 NMSA 1978;

(2) fourteen to eighteen years of age at the time of the offense, who is adjudicated for any felony offense and who has had three prior, separate felony adjudications within a three-year time period immediately preceding the instant offense. The felony adjudications relied upon as prior adjudications shall not have arisen out of the same transaction or occurrence or series of events related in time and location. Successful completion of consent decrees are not considered a prior adjudication for the purposes of this paragraph; or

(3) fourteen years of age and who is adjudicated for first degree murder, as provided in Section 30-2-1 NMSA 1978.

N.M. STAT. ANN. § 32A-2-20. Disposition of a youthful offender.

A. The court has the discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender. The children's court attorney shall file a notice of intent to invoke an adult sentence within ten working days of the filing of the petition, provided that the court may extend the time for filing of the notice of intent to invoke an adult sentence, for good cause shown, prior to the adjudicatory hearing. A preliminary hearing by the court or a hearing before a grand jury shall be held, within ten days after the filing of the intent to invoke an adult sentence, to determine whether probable cause exists to support the allegations contained in the petition.

....

E. If the court invokes an adult sentence, the court may sentence the child to less than, but shall not exceed, the mandatory adult sentence. A youthful offender given an adult sentence shall be treated as an adult offender and shall be transferred to the legal custody of an agency responsible for incarceration of persons sentenced to adult sentences. This transfer terminates the jurisdiction of the court over the child with respect to the delinquent acts alleged in the petition.

....

G. A child fourteen years of age or older, charged with first degree murder, but not convicted of first degree murder and found to have committed a youthful offender offense as set forth in Subsection

I of Section 32A-2-3 NMSA 1978, is subject to the dispositions set forth in this section.

H. A child fourteen years of age or older charged with first degree murder, but found to have committed a delinquent act that is neither first degree murder nor a youthful offender offense as set forth in Subsection I of Section 32A-2-3 NMSA 1978, shall be adjudicated as a delinquent subject to the dispositions set forth in Section 32A-2-19 NMSA 1978.

II. LWOP PROVISIONS

N.M. STAT. ANN. § 31-18-13. Sentencing authority; all crimes.

A. Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the Criminal Sentencing Act; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act.

....

N.M. STAT. ANN. § 31-18-14. Sentencing authority; capital felonies.

When a defendant has been convicted of a capital felony, the defendant shall be sentenced to life

imprisonment or life imprisonment without possibility of release or parole.

NEW YORK

I. JUVENILE TRANSFER PROVISIONS

N.Y. PENAL LAW § 30.00. Infancy.

1. Except as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for conduct.

2. A person thirteen, fourteen or fifteen years of age is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible or for such conduct as a sexually motivated felony, where authorized pursuant to section 130.91 of the penal law; . . .

II. LWOP PROVISIONS

N.Y. PENAL LAW § 125.25. Murder in the second degree.

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime; or

2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person; or

3. Acting either alone or with one or more other persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and, in the course of and in furtherance of such crime or of immediate flight therefrom, he, or another

participant, if there be any, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision, in which the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant:

(a) Did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid the commission thereof; and

(b) Was not armed with a deadly weapon, or any instrument, article or substance readily capable of causing death or serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons; and

(c) Had no reasonable ground to believe that any other participant was armed with such a weapon, instrument, article or substance; and

(d) Had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury; or

4. Under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than eleven years old and thereby causes the death of such person; or

5. Being eighteen years old or more, while in the course of committing rape in the first, second or third degree, criminal sexual act in the first, second or third degree, sexual abuse in the first degree, aggravated sexual abuse in the first, second, third or fourth degree, or incest in the first, second or third degree, against a person less than fourteen years old, he or she intentionally causes the death of such person.

Murder in the second degree is a class A-I felony.

N.Y. PENAL LAW § 70.00. Sentence of imprisonment for felony.

....

5. Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life imprisonment without parole shall not be or become eligible for parole or conditional release. For purposes of commitment and custody, other than parole and conditional release, such sentence shall be deemed to be an indeterminate sentence. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime. A defendant must be sentenced to life imprisonment without parole upon conviction for the crime of terrorism as defined in section 490.25 of this chapter, where the specified offense the defendant

committed is a class A-I felony; the crime of criminal possession of a chemical weapon or biological weapon in the first degree as defined in section 490.45 of this chapter; or the crime of criminal use of a chemical weapon or biological weapon in the first degree as defined in section 490.55 of this chapter; provided, however, that nothing in this subdivision shall preclude or prevent a sentence of death when the defendant is also convicted of the crime of murder in the first degree as defined in section 125.27 of this chapter. A defendant must be sentenced to life imprisonment without parole upon conviction for the crime of murder in the second degree as defined in subdivision five of section 125.25 of this chapter or for the crime of aggravated murder as defined in subdivision one of section 125.26 of this chapter. A defendant may be sentenced to life imprisonment without parole upon conviction for the crime of aggravated murder as defined in subdivision two of section 125.26 of this chapter.

N.Y. PENAL LAW § 70.05. Sentence of imprisonment for juvenile offender.

1. Indeterminate sentence. A sentence of imprisonment for a felony committed by a juvenile offender shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section. The court shall further provide that where a juvenile offender is

under placement pursuant to article three of the family court act, any sentence imposed pursuant to this section which is to be served consecutively with such placement shall be served in a facility designated pursuant to subdivision four of section 70.20 of this article prior to service of the placement in any previously designated facility.

2. Maximum term of sentence. The maximum term of an indeterminate sentence for a juvenile offender shall be at least three years and the term shall be fixed as follows:

(a) For the class A felony of murder in the second degree, the term shall be life imprisonment;

NORTH CAROLINA

I. JUVENILE TRANSFER PROVISIONS

N.C. GEN. STAT. § 7B-2200. Transfer of jurisdiction of juvenile to superior court.

After notice, hearing, and a finding of probable cause the court may, upon motion of the prosecutor or the juvenile's attorney or upon its own motion, transfer jurisdiction over a juvenile to superior court if the juvenile was 13 years of age or older at the time the juvenile allegedly committed an offense that would be a felony if committed by an adult. If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults.

II. LWOP PROVISIONS

N.C. GEN. STAT. § 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A

felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine, when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

NORTH DAKOTA

I. JUVENILE TRANSFER PROVISIONS

N.D. CENT. CODE § 12.1-04-01. Juveniles.

Persons under the age of seven years are deemed incapable of commission of an offense defined by the constitution or statutes of this state. The prosecution of any person as an adult is barred if the offense was committed while the person was less than fourteen years of age.

N.D. CENT. CODE § 27-20-34. Transfer to other courts.

1. After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances or resolutions of this state, the court before hearing the petition on its merits shall transfer the offense for prosecution to the appropriate court having jurisdiction of the offense if:

a. The child is over sixteen or more years of age and requests the transfer;

b. The child was fourteen years of age or more at the time of the alleged conduct and the court determines that there is probable cause to believe the child committed the alleged delinquent act and the delinquent act involves the offense of murder or attempted murder; gross sexual imposition or the attempted gross sexual imposition of a victim by force or by

threat of imminent death, serious bodily injury, or kidnapping; or the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance in violation of subdivision a or b of subsection 1 of section 19-03.1-23, except for the manufacture, delivery, or possession with intent to manufacture or deliver marijuana in an amount less than one pound [.45 kilogram]; or the gratuitous delivery of a controlled substance not a narcotic drug or methamphetamine which is a singular and isolated event involving an amount of controlled substance sufficient solely for a single personal use; or . . .

....

II. LWOP PROVISIONS

N.D. CENT. CODE § 12.1-32-01. Classification of offenses—Penalties.

Offenses are divided into seven classes, which are denominated and subject to maximum penalties, as follows:

1. Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed. The court must designate whether the life imprisonment sentence imposed is with or without an opportunity for parole. Notwithstanding the provisions of section 12-59-05, a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible

to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary.

....

N.D. CENT. CODE § 12.1-32-09.1. Sentencing of violent offenders.

Except as provided under section 12-48.1-02 and pursuant to rules adopted by the department of corrections and rehabilitation, an offender who is convicted of a crime in violation of section 12.1-16-01, 12.1-16-02, 12.1-17-02, 12.1-18-01, subdivision a of subsection 1 or subdivision b of subsection 2 of section 12.1-20-03, section 12.1-22-01, subdivision b of subsection 2 of section 12.1-22-02, or an attempt to commit the offenses, and who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted. In the case of an offender who is sentenced to a term of life imprisonment with opportunity for parole under subsection 1 of section 12.1-32-01, the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. The remaining life expectancy of the offender must be calculated on the date of sentencing, computed by reference to a recognized mortality table as established by rule by the supreme court. Notwithstanding this section, an offender sentenced under subsection 1 of section

12.1-32-01 may not be eligible for parole until the requirements of that subsection have been met.

OHIO

I. JUVENILE TRANSFER PROVISIONS

OHIO REV. CODE ANN. § 2152.10. Mandatory transfer; discretionary transfer.

(A) A child who is alleged to be a delinquent child is eligible for mandatory transfer and shall be transferred as provided in section 2152.12 of the Revised Code in any of the following circumstances:

(1) The child is charged with a category one offense and either of the following apply:

(a) The child was sixteen years of age or older at the time of the act charged.

(b) The child was fourteen or fifteen years of age at the time of the act charged and previously was adjudicated a delinquent child for committing an act that is a category one or category two offense and was committed to the legal custody of the department of youth services upon the basis of that adjudication.

(2) The child is charged with a category two offense, other than a violation of section 2905.01 of the Revised Code, the child was sixteen years of age or older at the time of the commission of the act charged, and either or both of the following apply:

(a) The child previously was adjudicated a delinquent child for committing an act that is a category one or a category two offense

and was committed to the legal custody of the department of youth services on the basis of that adjudication.

(b) The child is alleged to have had a firearm on or about the child's person or under the child's control while committing the act charged and to have displayed the firearm, brandished the firearm, indicated possession of the firearm, or used the firearm to facilitate the commission of the act charged.

(3) Division (A)(2) of section 2152.12 of the Revised Code applies.

(B) Unless the child is subject to mandatory transfer, if a child is fourteen years of age or older at the time of the act charged and if the child is charged with an act that would be a felony if committed by an adult, the child is eligible for discretionary transfer to the appropriate court for criminal prosecution. In determining whether to transfer the child for criminal prosecution, the juvenile court shall follow the procedures in section 2152.12 of the Revised Code. If the court does not transfer the child and if the court adjudicates the child to be a delinquent child for the act charged, the court shall issue an order of disposition in accordance with section 2152.11 of the Revised Code.

OHIO REV. CODE ANN. § 2152.12. Transfer of cases from juvenile court.

(A)(1)(a) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would be aggravated murder, murder, attempted aggravated murder, or attempted murder if committed by an adult, the juvenile court at a hearing shall transfer the case if either of the following applies:

> **(i) The child was sixteen or seventeen years of age at the time of the act charged and there is probable cause to believe that the child committed the act charged.**
>
> **(ii) The child was fourteen or fifteen years of age at the time of the act charged, section 2152.10 of the Revised Code provides that the child is eligible for mandatory transfer, and there is probable cause to believe that the child committed the act charged.**

....

II. LWOP PROVISIONS

OHIO REV. CODE ANN. § 2929.023. Defendant's age; raising issue; burdens relating to matter.

A person charged with aggravated murder and one or more specifications of an aggravating circumstance may, at trial, raise the matter of his age at the time of the alleged commission of the offense and may present evidence at trial that he

was not eighteen years of age or older at the time of the alleged commission of the offense. The burdens of raising the matter of age, and of going forward with the evidence relating to the matter of age, are upon the defendant. After a defendant has raised the matter of age at trial, the prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the defendant was eighteen years of age or older at the time of the alleged commission of the offense.

OHIO REV. CODE ANN. § 2929.03. Imposing sentence for a capital offense; procedures; proof of relevant factors; alternative sentences.

....

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

(a) Life imprisonment without parole;

(b) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(c) Subject to division (E)(2)(d) of this section, life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(d) If the victim of the aggravated murder was less than thirteen years of age, the offender also is convicted of or pleads guilty to a sexual motivation specification that was included in the indictment, count in the indictment, or information charging the offense, and the trial court does not impose a sentence of life imprisonment without parole on the offender pursuant to division (E)(2)(a) of this section, the court or panel shall sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code to an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated

murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

....

OKLAHOMA

I. JUVENILE TRANSFER PROVISIONS

OKLA. STAT. tit. 10A, § 2-5-205. Certification as youthful offender or juvenile.

A. Any person thirteen (13) or fourteen (14) years of age who is charged with murder in the first degree shall be held accountable for the act as if the person were an adult; provided, the person may be certified as a youthful offender or a juvenile as provided by this section, unless the person is subject to the provisions of subsection G of Section 2-5-204 of this title.

B. Any person fifteen (15), sixteen (16) or seventeen (17) years of age who is charged with murder in the first degree at that time shall be held accountable for his or her act as if the person was an adult and shall not be subject to the provisions of the Youthful Offender Act or the provisions of the Juvenile Code for certification as a juvenile. The person shall have all the statutory rights and protections of an adult accused of a crime. All proceedings shall be as for a criminal action and the provisions of Title 22 of the Oklahoma Statutes shall apply. A person having been convicted as an adult pursuant to this paragraph shall be tried as an adult for every subsequent offense.

II. LWOP PROVISIONS

OKLA. STAT. tit. 21, § 701.9. Punishment for murder.

A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death, by imprisonment for life without parole or by imprisonment for life. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree, as described in subsection E of Section 701.7 of this title, shall not be entitled to or afforded the benefit of deferment of the sentence.

B. A person who is convicted of or pleads guilty or nolo contendere to murder in the second degree shall be guilty of a felony punishable by imprisonment in a state penal institution for not less than ten (10) years nor more than life.

OREGON

I. JUVENILE TRANSFER PROVISIONS

OR. REV. STAT. § 419C.352. Grounds for waiver of youth under 15 years for prosecution as adult.

The juvenile court, after a hearing, except as provided in ORS 419C.364 or 419C.370, may waive a youth under 15 years of age at the time the act was committed to circuit court for prosecution as an adult if:

(1) The youth is represented by counsel during the waiver proceedings;

(2) The juvenile court makes the findings required under ORS 419C.349 (3) and (4); and

(3) The youth is alleged to have committed an act or acts that if committed by an adult would constitute one or more of the following crimes:

(a) Murder or any aggravated form thereof under ORS 163.095 or 163.115;

(b) Rape in the first degree under ORS 163.375 (1)(a);

(c) Sodomy in the first degree under ORS 163.405 (1)(a); or

(d) Unlawful sexual penetration in the first degree under ORS 163.411 (1)(a).

II. LWOP PROVISIONS

OR. REV. STAT. § 161.620. Waiver from juvenile court; sentences.

Notwithstanding any other provision of law, a sentence imposed upon any person waived from the juvenile court under ORS 419C.349, 419C.352, 419C.364 or 419C.370 shall not include any sentence of death or life imprisonment without the possibility of release or parole nor imposition of any mandatory minimum sentence except that a mandatory minimum sentence under:

(1) ORS 163.105 (1)(c) shall be imposed; and

(2) ORS 161.610 may be imposed.

OR. REV. STAT. § 163.105. Sentencing for aggravated murder.

Notwithstanding the provisions of ORS chapter 144 and ORS 421.450 to 421.490:

(1)(a) Except as otherwise provided in ORS 137.700, when a defendant is convicted of aggravated murder as defined by ORS 163.095, the defendant shall be sentenced, pursuant to ORS 163.150, to death, life imprisonment without the possibility of release or parole or life imprisonment.

(b) A person sentenced to life imprisonment without the possibility of release or parole under this section shall not have that sentence suspended, deferred or commuted by any

judicial officer, and the State Board of Parole and Post-Prison Supervision may not parole the prisoner nor reduce the period of confinement in any manner whatsoever. The Department of Corrections or any executive official may not permit the prisoner to participate in any sort of release or furlough program.

(c) If sentenced to life imprisonment, the court shall order that the defendant shall be confined for a minimum of 30 years without possibility of parole, release to post-prison supervision, release on work release or any form of temporary leave or employment at a forest or work camp.

....

PENNSYLVANIA

I. JUVENILE TRANSFER PROVISIONS

42 PA. CONS. STAT. ANN. § 6355. Transfer to criminal proceedings.

(a) General rule.--After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this Commonwealth, the court before hearing the petition on its merits may rule that this chapter is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if all of the following exist:

(1) The child was 14 or more years of age at the time of the alleged conduct.

(2) A hearing on whether the transfer should be made is held in conformity with this chapter.

(3) Notice in writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.

(4) The court finds:

(i) that there is a prima facie case that the child committed the delinquent act alleged;

(ii) that the delinquent act would be considered a felony if committed by an adult;

(iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:

(A) the impact of the offense on the victim or victims;

(B) the impact of the offense on the community;

(C) the threat to the safety of the public or any individual posed by the child;

(D) the nature and circumstances of the offense allegedly committed by the child;

(E) the degree of the child's culpability;

(F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and

(G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

(II) mental capacity;

(III) maturity;

(IV) the degree of criminal sophistication exhibited by the child;

(V) previous records, if any;

(VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;

(VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;

(VIII) probation or institutional reports, if any;

(IX) any other relevant factors; and

(iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

(b) Chapter inapplicable following transfer.--The transfer terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition.

(c) Transfer at request of child.--The child may request that the case be transferred for prosecution in which event the court may order this chapter not applicable.

(d) Effect of transfer from criminal proceedings.--No hearing shall be conducted where this chapter becomes applicable because of a previous determination by the court in a criminal proceeding.

(e) Murder and other excluded acts.--Where the petition alleges conduct which if proven would constitute murder, or any of the offenses excluded by paragraph (2)(ii) or (iii) of the definition of "delinquent act" in section 6302 (relating to definitions), the court shall require the offense to be prosecuted under the criminal law and procedures, except where the case has been transferred pursuant to section 6322 (relating to transfer from criminal proceedings) from the division or a judge of the court assigned to conduct criminal proceedings.

II. LWOP PROVISIONS

18 PA. CONS. STAT. ANN. § 1102. Sentence for murder and murder of an unborn child.

(a) First degree.--

(1) A person who has been convicted of a murder of the first degree or of murder of a law enforcement officer of the first degree shall be sentenced to death or to a term of life imprisonment in accordance with 42 Pa.C.S. § 9711 (relating to sentencing procedure for murder of the first degree).

(2) The sentence for a person who has been convicted of first degree murder of an unborn child shall be the same as the sentence for murder of the first degree, except that the death penalty shall not be imposed. This paragraph shall not affect the determination of an

aggravating circumstance under 42 Pa.C.S. § 9711(d)(17) for the killing of a pregnant woman.

....

61 PA. CONS. STAT. ANN. § 6137. Parole power.

(a) General criteria for parole.--

(1) The board may parole subject to consideration of guidelines established under 42 Pa.C.S. § 2154.5 (relating to adoption of guidelines for parole) and may release on parole any inmate to whom the power to parole is granted to the board by this chapter, except an inmate condemned to death or serving life imprisonment, whenever in its opinion:

(i) The best interests of the inmate justify or require that the inmate be paroled.

(ii) It does not appear that the interests of the Commonwealth will be injured by the inmate's parole.

(2) parole shall be subject in every instance to the Commonwealth's right to immediately retake and hold in custody without further proceedings any parolee charged after his parole with an additional offense until a determination can be made whether to continue his parole status.

(3) The power to parole granted under this section to the board may not be exercised in the board's discretion at any time before, but only

after, the expiration of the minimum term of imprisonment fixed by the court in its sentence or by the Board of Pardons in a sentence which has been reduced by commutation.

....

RHODE ISLAND

I. JUVENILE TRANSFER PROVISIONS

R.I. GEN. LAWS § 14-1-7. Waiver of jurisdiction or certification hearing.

(a) If any child is charged with an offense which would be punishable by life imprisonment if committed by an adult, that child, upon motion of the attorney general, shall be brought before the court and the court shall conduct a waiver hearing pursuant to § 14-1-7.1.

(b) Any child sixteen (16) years of age or older who is charged with an offense which would constitute a felony if committed by an adult shall, upon motion of the attorney general, be brought before the court and the court shall conduct a waiver hearing pursuant to § 14-1-7.1.

....

II. LWOP PROVISIONS

R.I. GEN. LAWS § 11-23-2. Penalties for murder.

Every person guilty of murder in the first degree shall be imprisoned for life. Every person guilty of murder in the first degree: (1) committed intentionally while engaged in the commission of another capital offense or other felony for which life imprisonment may be imposed; (2) committed in a manner creating a great risk of death to more than one person by means of a weapon or device or substance which would normally be hazardous to

the life of more than one person; (3) committed at the direction of another person in return for money or any other thing of monetary value from that person; (4) committed in a manner involving torture or an aggravated battery to the victim; (5) committed against any member of the judiciary, law enforcement officer, corrections employee, assistant attorney general or special assistant attorney general, or firefighter arising from the lawful performance of his or her official duties; (6) committed by a person who at the time of the murder was committed to confinement in the adult correctional institutions or the state reformatory for women upon conviction of a felony; or (7) committed during the course of the perpetration or attempted perpetration of felony manufacture, sale, delivery or other distribution of a controlled substance otherwise prohibited by the provisions of chapter 28 of title 21; shall be imprisoned for life and if ordered by the court pursuant to chapter 19.2 of title 12 that person shall not be eligible for parole from imprisonment. Every person guilty of murder in the second degree shall be imprisoned for not less than ten (10) years and may be imprisoned for life.

SOUTH CAROLINA

I. JUVENILE TRANSFER PROVISIONS

S.C. CODE ANN. § 63-19-1210. Transfer of jurisdiction.

....

(1) If, during the pendency of a criminal or quasi-criminal charge against a child in a circuit court of this State, it is ascertained that the child was under the age of seventeen years at the time of committing the alleged offense, it is the duty of the circuit court immediately to transfer the case, together with all the papers, documents, and testimony connected with it, to the family court of competent jurisdiction, except in those cases where the Constitution gives to the circuit court exclusive jurisdiction or in those cases where jurisdiction has properly been transferred to the circuit court by the family court under the provisions of this section....

...

(5) If a child fourteen or fifteen years of age is charged with an offense which, if committed by an adult, would be a Class A, B, C, or D felony as defined in Section 16-1-20 or a felony which provides for a maximum term of imprisonment of fifteen years or more, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

....

(10) If a child fourteen years of age or older is charged with an offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years or more, the court acting as committing magistrate shall bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult. For the purpose of this item, an adjudication or conviction is considered a second adjudication or conviction only if the date of the commission of the second offense occurred subsequent to the imposition of the sentence for the first offense.

II. LWOP PROVISIONS

S.C. CODE ANN. § 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of

death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early

release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

....

SOUTH DAKOTA

I. JUVENILE TRANSFER PROVISIONS

S.D. CODIFIED LAWS § 22-3-1. Persons capable of committing crimes – Exceptions.

Any person is capable of committing a crime, except those included in the following classes:

(1) Any child under the age of ten years;

(2) Any child of the age of ten years, but under the age of fourteen years, in the absence of proof that at the time of the committing the act or neglect charged, the child knew its wrongfulness;

....

S.D. CODIFIED LAWS § 26-11-4. Criminal proceedings against child charged with felony permitted by circuit court – Transfer hearing – Factors considered – Order holding child – Retention of jurisdiction by court.

Except as provided in § 26-11-3.1, the circuit court may, in any case of a delinquent child against whom criminal felony charges have been filed, after transfer hearing, permit such child to be proceeded against in accordance with the laws that may be in force in this state governing the commission of crimes. In such cases the petition filed under chapter 26-7A shall be dismissed. The hearing shall be conducted as provided by this section.

At the transfer hearing, the court shall consider only whether it is contrary to the best interest of the child and of the public to retain jurisdiction over the child....

II. LWOP PROVISIONS

S.D. CODIFIED LAWS § 22-6-1. Felony classes and penalties--Restitution--Habitual criminal sentences.

Except as otherwise provided by law, felonies are divided into the following nine classes which are distinguished from each other by the following maximum penalties which are authorized upon conviction:

(1) Class A felony: death or life imprisonment in the state penitentiary. A lesser sentence than death or life imprisonment may not be given for a Class A felony. In addition, a fine of fifty thousand dollars may be imposed;

....

S.D. CODIFIED LAWS § 24-15-4. Person under life sentence not eligible for parole.

No inmate sentenced to life imprisonment is eligible for parole by the Board of Pardons and Paroles.

TENNESSEE

I. JUVENILE TRANSFER PROVISIONS

TENN. CODE ANN. § 37-1-134. Transfer to criminal court.

(a) After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:

(1) The child was sixteen (16) years or more of age at the time of the alleged conduct, or the child was less than sixteen (16) years of age if such child was charged with the offense of first degree murder, second degree murder, rape, aggravated rape, rape of a child, aggravated rape of a child, aggravated robbery, especially aggravated robbery, kidnapping, aggravated kidnapping or especially aggravated kidnapping or an attempt to commit any such offenses. The district attorney general may not seek, nor may any child transferred under the provisions of this section receive, a sentence of death for the offense for which the child was transferred;

....

II. LWOP PROVISIONS

TENN. CODE ANN. § 39-13-202. First degree murder.

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect, rape of a child, aggravated rape of a child or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

(b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3), except the intent to commit the enumerated offenses or acts in those subdivisions.

(c) A person convicted of first degree murder shall be punished by:

(1) Death;

(2) Imprisonment for life without possibility of parole; or

(3) Imprisonment for life.

....

UTAH

I. JUVENILE TRANSFER PROVISIONS

UTAH CODE ANN. § 78A-6-602. Petition – Preliminary inquiry – Nonjudicial adjustments – Formal referral – Citation – Failure to appear.

....

(3) Except as provided in Sections 78A-6-701 and 78A-6-702, in the case of a minor 14 years of age or older, the county attorney, district attorney, or attorney general may commence an action by filing a criminal information and a motion requesting the juvenile court to waive its jurisdiction and certify the minor to the district court.

II. LWOP PROVISIONS

UTAH CODE ANN. § 76-3-206. Capital felony—Penalties.

(1) A person who has pled guilty to or been convicted of a capital felony shall be sentenced in accordance with Section 76-3-207. That sentence shall be death, an indeterminate prison term of not less than 25 years and which may be for life, or, on or after April 27, 1992, life in prison without parole.

....

VERMONT

I. JUVENILE TRANSFER PROVISIONS

VT. STAT. ANN. tit. 33, § 5201. Commencement of delinquency proceedings.

(a) Proceedings under this chapter shall be commenced by:

(1) transfer to the court of a proceeding from another court as provided in section 5203 of this title; or

(2) the filing of a delinquency petition by a state's attorney.

(b) If the proceeding is commenced by transfer from another court, no petition need be filed; however, the state's attorney shall provide to the court the name and address of the child's custodial parent, guardian, or custodian and the name and address of any noncustodial parent if known.

(c) Consistent with applicable provisions of Title 4, any proceeding concerning a child who is alleged to have committed an act specified in subsection 5204(a) of this title after attaining the age of 14, but not the age of 18, shall originate in district or superior court, provided that jurisdiction may be transferred in accordance with this chapter.

....

VT. STAT. ANN. tit. 33, § 5204. Transfer from juvenile court.

(a) After a petition has been filed alleging delinquency, upon motion of the state's attorney and after hearing, the juvenile court may transfer jurisdiction of the proceeding to the criminal division of the superior court, if the child had attained the age of 10 but not the age of 14 at the time the act was alleged to have occurred, and if the delinquent act set forth in the petition was any of the following:

(1) arson causing death as defined in 13 V.S.A. § 501;

(2) assault and robbery with a dangerous weapon as defined in 13 V.S.A. § 608(b);

(3) assault and robbery causing bodily injury as defined in 13 V.S.A. § 608(c);

(4) aggravated assault as defined in 13 V.S.A. § 1024;

(5) murder as defined in 13 V.S.A. § 2301;

(6) manslaughter as defined in 13 V.S.A. § 2304;

(7) kidnapping as defined in 13 V.S.A. § 2405;

(8) unlawful restraint as defined in 13 V.S.A. § 2406 or 2407;

(9) maiming as defined in 13 V.S.A. § 2701;

(10) sexual assault as defined in 13 V.S.A. § 3252(a)(1) or (a)(2);

(11) aggravated sexual assault as defined in 13 V.S.A. § 3253; or

(12) burglary into an occupied dwelling as defined in 13 V.S.A. § 1201(c).

(b) The state's attorney of the county where the juvenile petition is pending may move in the juvenile court for an order transferring jurisdiction under subsection (a) of this section within ten days of the filing of the petition alleging delinquency. The filing of the motion to transfer jurisdiction shall automatically stay the time for the hearing provided for in section 5225 of this title, which stay shall remain in effect until such time as the juvenile court may deny the motion to transfer jurisdiction.

....

II. LWOP PROVISIONS

VT. STAT. ANN. tit. 13, § 2303. Penalties for first and second degree murder.

(a)(1) The punishment for murder in the first degree shall be imprisonment for:

(A) a minimum term of not less than 35 years and a maximum term of life; or

(B) life without the possibility of parole.

....

VT. STAT. ANN. tit. 13, § 2311. Aggravated murder defined.

(a) A person is guilty of aggravated murder if he or she commits a first or second degree murder, as defined in section 2301 of this title, and at the time of his or her actions, one or more of the following circumstances was in fact present:

(1) The murder was committed while the defendant was in custody under sentence for murder or aggravated murder.

(2) The defendant had, prior to commencement of the trial for aggravated murder, been convicted of another aggravated murder or murder in any jurisdiction in the United States and territories.

(3) At the time of the murder, the defendant also committed another murder.

(4) At the time of the murder, the defendant knowingly created a great risk of death to another person or persons.

(5) The murder was committed for the purpose of avoiding or preventing lawful arrest by a law enforcement officer of any person, or effecting an escape by any person from lawful custody of a law enforcement officer.

(6) The murder was committed by a person hired for such purpose in return for anything of value. Both the person hired and the person

hiring him or her are guilty of aggravated murder.

(7) The victim of the murder was known by the person to be a person employed in any capacity in or about a correctional facility or a law enforcement officer, and was performing his or her official duties.

(8) The murder was committed in perpetrating or attempting to perpetrate sexual assault or aggravated sexual assault.

(b) In a prosecution for aggravated murder, the state shall allege and prove beyond a reasonable doubt one or more of the circumstances enumerated in subsection (a) of this section.

(c) The punishment for aggravated murder shall be imprisonment for life and for no lesser term. The court shall not place on probation or suspend or defer the sentence of any person convicted of aggravated murder. A person sentenced under this section shall not be eligible for parole during the term of imprisonment imposed herein and shall not be eligible for work-release or noncustodial furlough except when serious medical services make custodial furlough inappropriate.

VIRGINIA

I. JUVENILE TRANSFER PROVISIONS

VA. CODE ANN. § 16.1-269.1. Trial in circuit court; preliminary hearing; direct indictment; remand.

....

B. The juvenile court shall conduct a preliminary hearing whenever a juvenile fourteen years of age or older is charged with murder in violation of §§ 18.2-31, 18.2-32 or § 18.2-40, or aggravated malicious wounding in violation of § 18.2-51.2.

C. The juvenile court shall conduct a preliminary hearing whenever a juvenile fourteen years of age or older is charged with murder in violation of § 18.2-33, felonious injury by mob in violation of § 18.2-41, abduction in violation of § 18.2-48, malicious wounding in violation of § 18.2-51, malicious wounding of a law-enforcement officer in violation of § 18.2-51.1, felonious poisoning in violation of § 18.2-54.1, adulteration of products in violation of § 18.2-54.2, robbery in violation of § 18.2-58 or carjacking in violation of § 18.2-58.1, rape in violation of § 18.2-61, forcible sodomy in violation of § 18.2-67.1 or object sexual penetration in violation of § 18.2-67.2, provided the attorney for the Commonwealth gives written notice of his intent to proceed pursuant to this subsection. The notice shall be filed with the court and mailed or delivered to counsel for the juvenile or, if the juvenile is not then represented by counsel, to the juvenile and a parent, guardian or other person standing in loco parentis with respect to the

juvenile at least seven days prior to the preliminary hearing. If the attorney for the Commonwealth elects not to give such notice, or if he elects to withdraw the notice prior to certification of the charge to the grand jury, he may proceed as provided in subsection A.

D. Upon a finding of probable cause pursuant to a preliminary hearing under subsection B or C, the juvenile court shall certify the charge, and all ancillary charges, to the grand jury. Such certification shall divest the juvenile court of jurisdiction as to the charge and any ancillary charges. Nothing in this subsection shall divest the juvenile court of jurisdiction over any matters unrelated to such charge and ancillary charges which may otherwise be properly within the jurisdiction of the juvenile court.

....

II. LWOP PROVISIONS

VA. CODE ANN. § 53.1-165.1. Limitation on the application of parole statutes.

The provisions of this article, except §§ 53.1-160 and 53.1-160.1, shall not apply to any sentence imposed or to any prisoner incarcerated upon a conviction for a felony offense committed on or after January 1, 1995. Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.

VA. CODE ANN. § 18.2-10. Punishment for conviction of felony; penalty.

The authorized punishments for conviction of a felony are:

(a) For Class 1 felonies, death, if the person so convicted was 18 years of age or older at the time of the offense and is not determined to be mentally retarded pursuant to § 19.2-264.3:1.1, or imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000. If the person was under 18 years of age at the time of the offense or is determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the punishment shall be imprisonment for life and, subject to subdivision (g), a fine of not more than $100,000.

....

WASHINGTON

I. JUVENILE TRANSFER PROVISIONS

WASH. REV. CODE ANN. § 9A.04.050. People capable of committing crimes–Capability of children.

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he or she may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his or her examination by one or more physicians, whose opinion shall be competent evidence upon the question of his or her age.

WASH. REV. CODE ANN. § 13.40.110. Hearing on question of declining jurisdiction–Held, when—Findings.

(1) Discretionary decline hearing--The prosecutor, respondent, or the court on its own motion may, before a hearing on the information on its merits, file a motion requesting the court to transfer the respondent for adult criminal prosecution and the matter shall be set for a hearing on the question of declining jurisdiction.

....

II. LWOP PROVISIONS

WASH. REV. CODE ANN. § 10.95.020. Definition.

A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW 9.41.010, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a

crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW 9.94A.030;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW 10.99.020(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW 9A.46.020; or

(b) Any criminal assault.

WASH. REV. CODE ANN. § 10.95.030. Sentences for aggravated first degree murder.

(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not permit such prisoner to participate in any sort of release or furlough program.

WEST VIRGINIA

I. JUVENILE TRANSFER PROVISIONS

W. VA. CODE ANN. § 49-5-10. Waiver and transfer of jurisdiction.

(a) Upon written motion of the prosecuting attorney filed at least eight days prior to the adjudicatory hearing and with reasonable notice to the juvenile, his or her counsel, and his or her parents, guardians or custodians, the court shall conduct a hearing to determine if juvenile jurisdiction should or must be waived and the proceeding transferred to the criminal jurisdiction of the court.

....

(c) The court shall transfer a juvenile proceeding to criminal jurisdiction if a juvenile who has attained the age of fourteen years makes a demand on the record to be transferred to the criminal jurisdiction of the court. The case may then be referred to magistrate or circuit court for further proceedings, subject to the court's jurisdiction.

(d) The court shall transfer a juvenile proceeding to criminal jurisdiction if there is probable cause to believe that:

(1) The juvenile is at least fourteen years of age and has committed the crime of treason under section one, article one, chapter sixty-one of this code; the crime of murder under sections one, two and three, article two of said chapter; the crime of robbery involving the use or presenting

of firearms or other deadly weapons under section twelve of said article; the crime of kidnapping under section fourteen-a of said article; the crime of first degree arson under section one, article three of said chapter; or the crime of sexual assault in the first degree under section three, article eight-b of said chapter; or

(2) The juvenile is at least fourteen years of age and has committed an offense of violence to the person which would be a felony if the juvenile was an adult: Provided, That the juvenile has been previously adjudged delinquent for the commission of an offense of violence to the person which would be a felony if the juvenile was an adult; or

(3) The juvenile is at least fourteen years of age and has committed an offense which would be a felony if the juvenile was an adult: Provided, That the juvenile has been twice previously adjudged delinquent for the commission of an offense which would be a felony if the juvenile was an adult.

....

II. LWOP PROVISIONS

W. VA. CODE ANN. § 61-2-2. Penalty for murder of first degree.

Murder of the first degree shall be punished by confinement in the penitentiary for life.

W. VA. COD ANN. § 62-3-15. Verdict and sentence in murder cases.

If a person indicted for murder be found by the jury guilty thereof, they shall in their verdict find whether he or she is guilty of murder of the first degree or second degree. If the person indicted for murder is found by the jury guilty thereof, and if the jury find in their verdict that he or she is guilty of murder of the first degree, or if a person indicted for murder pleads guilty of murder of the first degree, he or she shall be punished by imprisonment in the penitentiary for life, and he or she, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole: Provided, That the jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve, except that, notwithstanding any other provision of this code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years: Provided, however, That if the accused pleads guilty of murder of the first degree, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy, except that, notwithstanding any provision of said article twelve or any other provision of this

code to the contrary, such person shall not be eligible for parole until he or she has served fifteen years.

W. VA. CODE ANN. § 62-8-1. Offenses by inmates; conspiracy.

A person imprisoned or otherwise in the custody of the Commissioner of Corrections or the Executive Director of the Regional Jail and Correctional Facility Authority is guilty of a felony if he or she kills, wounds or inflicts other bodily injury upon any person at any correctional facility; or breaks, cuts or injures, or sets fire to any building, fixture or fastening of any correctional facility, or jail or any part thereof, for the purpose of escaping or aiding any other inmate to escape therefrom, or renders any correctional facility or jail less secure as a place of confinement; or makes, procures, secretes or has in his or her possession, any instrument, tool or other thing for such purpose, or with intent to kill, wound or inflict bodily injury; or resists the lawful authority of an officer or guard of any correctional facility or jail for such purpose or with such intent. Any three or more inmates so confined, or in such custody, who conspire together to commit any offense mentioned in this section are each guilty of a felony.

W. VA. CODE ANN. § 62-8-2. Punishment of convicts; no discharge from correctional institution while prosecution is pending.

(a) Any inmate who violates the provisions of section one of this article and the violation results in the death of any person is guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for life, and he or she shall not be eligible for parole, notwithstanding the provisions of article twelve, chapter sixty-two of this code.

....

WISCONSIN

I. JUVENILE TRANSFER PROVISIONS

WIS. STAT. ANN. § 938.183. Original adult court jurisdiction for criminal proceedings.

(1) Juveniles under adult court jurisdiction. Notwithstanding ss. 938.12(1) and 938.18, courts of criminal jurisdiction have exclusive original jurisdiction over all of the following:

(a) A juvenile who has been adjudicated delinquent and who is alleged to have violated s. 940.20(1) or 946.43 while placed in a juvenile correctional facility, a juvenile detention facility, or a secured residential care center for children and youth or who has been adjudicated delinquent and who is alleged to have committed a violation of s. 940.20(2m).

(am) A juvenile who is alleged to have attempted or committed a violation of s. 940.01 or to have committed a violation of s. 940.02 or 940.05 on or after the juvenile's 10th birthday.

....

II. LWOP PROVISIONS

WIS. STAT. ANN. § 940.01. First-degree intentional homicide.

(1) Offenses. (a) Except as provided in sub. (2), whoever causes the death of another human being with intent to kill that person or another is guilty of a Class A felony. . . .

....

WIS. STAT. ANN. § 939.50. Classification of Felonies.

. . .

(3) Penalties for felonies are as follows:

(a) For a Class A felony, life imprisonment.

....

WYOMING

I. JUVENILE TRANSFER PROVISIONS

WYO. STAT. ANN. § 14-6-203. Jurisdiction; confidentiality of records.

....

(f) The district attorney shall establish objective criteria, screening and assessment procedures for determining the court for appropriate disposition in cooperation and coordination with each municipality in the jurisdiction of the district court. The district attorney shall serve as the single point of entry for all minors alleged to have committed a crime. Except as otherwise provided in this section, copies of all charging documents, reports or citations for cases provided in this subsection shall be forwarded to the district attorney prior to the filing of the charge, report or citation in municipal or city court. The following cases, excluding status offenses, may be originally commenced either in the juvenile court or in the district court or inferior court having jurisdiction:

(i) Violations of municipal ordinances, except that if a juvenile is sentenced in a municipal court to a sentence exceeding ten (10) days of jail or detention, the municipal court shall provide to the district attorney in the juvenile's county of residency and the department of education a copy of the judgment and sentence;

(ii) All misdemeanors except:

(A) Those cases within the exclusive jurisdiction of the juvenile court; and

(B) If a juvenile is sentenced in a municipal or circuit court to a sentence exceeding ten (10) days of jail or detention, the municipal or circuit court shall provide to the district attorney in the juvenile's county of residency and the department of education a copy of the judgment and sentence.

(iii) Felony cases in which the minor has attained the age of seventeen (17) years. The prosecuting attorney shall consider those determinative factors set forth in W.S. 14-6-237(b)(i) through (vii) prior to commencing an action in the district court under this paragraph;

(iv) Cases in which the minor has attained the age of fourteen (14) years and is charged with a violent felony as defined by W.S. 6-1-104(a)(xii);

....

II. LWOP PROVISIONS

WYO. STAT. ANN. § 6-2-101. Murder in the first degree; penalty.

(a) Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate, any sexual assault, sexual abuse of a minor, arson, robbery, burglary, escape, resisting arrest, kidnapping or abuse of a child under the age

of sixteen (16) years, kills any human being is guilty of murder in the first degree.

(b) A person convicted of murder in the first degree shall be punished by death, life imprisonment without parole or life imprisonment according to law, except that no person shall be subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years.

(c) A person convicted of murder in the first degree in a case in which the state seeks the death penalty shall be sentenced in accordance with the provisions of W.S. 6-2-102. In all other cases, including any case in which the state has determined not to seek the death penalty at any stage of the proceeding, the judge shall determine the sentence of life imprisonment without parole or life imprisonment taking into consideration any negotiated plea agreement and any evidence relevant to a determination of sentence which the court deems to have probative value.

WYO. STAT. ANN. § 14-6-246. Sanction levels.

(a) Subject to subsection (c) of this section, when a child is adjudicated as a delinquent the juvenile court may, in a disposition hearing, assign the child one (1) of the following sanction levels according to the child's conduct:

(i) For a misdemeanor punishable under the Wyoming Criminal Code by imprisonment for

not more than six (6) months, the sanction level is one;

(ii) For a misdemeanor punishable under the Wyoming Criminal Code by imprisonment for not more than one (1) year, the sanction level is two;

(iii) For a felony, other than a violent felony as defined by W.S. 6-1-104(a)(xii), the sanction level is three;

(iv) For a violent felony as defined by W.S. 6-1-104(a)(xii), other than a felony punishable by life, life without parole or death, the sanction level is four;

(v) For a felony punishable under the Wyoming Criminal Code by life, life without parole or death, the sanction level is five.

....

WYO. STAT. ANN. § 6-10-301. Life imprisonment without parole.

(a) Pursuant to article 3, section 53 of the Wyoming constitution, a sentence of life imprisonment without parole is created for specified crimes designated in the Wyoming Criminal Code.

(b) A person sentenced to life imprisonment without parole shall not be eligible for parole and shall remain imprisoned under the jurisdiction of the department of corrections during the remainder of his life unless pardoned by the governor.

(c) A sentence specifically designated as a sentence of life imprisonment without parole is not subject to commutation by the governor. A sentence of life or life imprisonment which is not specifically designated as a sentence of life imprisonment without parole is subject to commutation by the governor. A person sentenced to life or life imprisonment is not eligible for parole unless the governor has commuted the person's sentence to a term of years.

WYO. STAT. ANN. § 7-13-402. General powers and duties of board; eligibility for parole; immunity.

(a) The board may grant a parole to any person imprisoned in any institution under sentence, except a sentence of life imprisonment without parole or a life sentence, ordered by any district court of this state, provided the person has served the minimum term pronounced by the trial court less good time, if any, granted under rules promulgated pursuant to W.S. 7-13-420.

....

OPPOSITION BRIEF

No. 10-9646

In the SUPREME COURT of the UNITED STATES

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED
(Rephrased)

I. Should this Court grant certiorari to determine whether the imposition of a life without parole sentence on a fourteen year old defendant convicted of capital murder categorically violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment, despite the lack of a split among the lower courts on this issue?

II. Should this Court grant certiorari to determine whether a mandatory sentence of life without parole on a fourteen year old defendant convicted of capital murder categorically violates the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishment, despite the lack of a split among the lower courts on this issue?

PARTIES

The caption contains the names of all parties in the courts below. The Attorney General for the State of Alabama represents Respondent in this proceeding.

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State Court Proceedings

After being transferred by the Juvenile Court of Lawrence County, Alabama to the Lawrence County Circuit Court, Miller was convicted of capital murder. *Ex parte E.J.M.*, 928 So. 2d 1081, 1082 (Ala. 2005); *Miller*, 2010 WL 3377692, at *1. The Alabama Court of Criminal Appeals affirmed the circuit court's decision on August 27, 2010. *See Miller*, 2010 WL 3377692, at *25. The Supreme Court of Alabama denied Miller's petition for a writ of certiorari, without opinion, on October 22, 2010. *Ex parte Miller*, No. 1091663 (Ala. Oct. 22, 2010).

JURISDICTION

After obtaining a extension of time, Miller filed a petition for writ of certiorari with this Court on March 21, 2011. This Court has jurisdiction to consider Miller's petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RELEVANT STATUTES

Miller correctly cites and quotes the relevant parts of the Eighth and Fourteenth Amendments to the United States Constitution, which govern the issues presented in his petition.

STATEMENT OF THE CASE

A. Facts of the Crime

There is no question about Evan Miller's guilt here—or that the murder at issue is among the most gruesome and intolerable crimes a human being can commit. Miller beat Cole Cannon repeatedly with his fists and a baseball bat and then set his trailer on fire, killing him—all because Miller's plan to steal Cannon's wallet did not go smoothly. (R. 613-1117)[1]

Colby Smith testified that in July of 2003, Miller brutally beat Cannon with a baseball bat and burned his trailer, killing him in the process. Smith had known Miller from his high school for about four to five months. (R. 979) On July 15, 2003, Smith was spending the night at Miller's home when Cannon, who lived in the trailer next door, came to the Millers' trailer around midnight complaining that he had burned his food and asking for something to eat. (R. 710, 980) As Miller's mother told Cannon he was welcome to some spaghetti, Smith could tell that Cannon had been drinking because he had alcohol on his breath and was "staggering." (R. 710, 980) While Cannon was at the Millers' trailer, Miller and Smith went to Cannon's trailer to look for drugs. (R. 981) Unable to find any, they decided to take some of Cannon's baseball cards and hide them by another trailer before returning to the Millers'. (R. 981-82)

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[1] Citations to the trial transcript are marked (R. __), while citations to the state-court record on appeal are marked (C. ___).

Miller and Smith went back over to Cannon's trailer with Cannon, intending to get him drunk and take his money. (R. 982) They all smoked a joint and began to play drinking games. (R. 982) Smith testified that, while Cannon was becoming drunk, he and Miller merely pretended to be drinking. (R. 983) When Cannon lay on the couch and passed out, Miller took his wallet. (R. 984) Miller and Smith went into the bathroom, where they split a little over $300. (R. 984) When Miller tried to put the wallet back in Cannon's back pocket, Cannon jumped up and grabbed Miller around the throat. (R. 984, 1016) Smith grabbed a baseball bat and hit Cannon in the head, throwing the bat down when Cannon hit the floor. (R. 984-85) Miller, however, got on top of Cannon and began hitting him continuously in the face with his fists. (R. 985) As Cannon was screaming, Miller picked up the bat and began hitting him "everywhere." (R. 985) Every time Cannon tried to get, he fell back down. (R. 985) After he stopped hitting Cannon with the bat, Miller placed a sheet over his head, saying, "Cole, I am God, I've come to take your life." (R. 986) He hit Cannon once more with the bat before returning to his own trailer with Smith. (R. 987)

After five minutes, Miller and Smith returned to Cannon's trailer, where they cleaned up the blood and set fires. (R. 987-88) Smith started a fire with a lighter in the back bedroom on a couch, and Miller set another couch on fire "to cover up the evidence." (R. 990) Before they left the trailer, Smith saw Cannon

"[j]ust laying there" and, feeling sorry for him, placed a towel under his head to stop the bleeding. (R. 989-90) As they were leaving Smith turned on the faucet in the kitchen sink and stopped it up, hoping it would put out the fires, and heard Cannon ask, "why are y'all doing this to me?" (R. 990-91) After going back to the Miller's trailer, Smith lay down for about ten minutes before trying to return to Cannon's trailer without telling Miller. (R. 992) When he got there, however, he could hear Cannon coughing but "smoke was coming out and [Miller was] coming behind [him,]" so he returned to the Miller's trailer. (R. 992)

Investigator Tim Sandlin of the Sheriff's Department interviewed Miller, who at first concocted a false story about the events at issue. Sandlin got basic information from Miller, learning that he was fourteen years old, and read him the Juvenile *Miranda* Form, which both Miller and his mother signed. (R. 700-04) Miller then began to recount the events of the evening of July 15th and early morning of July 16th, stating that he had spent the night at his trailer watching a movie before going to sleep. (R. 705-06) Although he reported that Cannon did come over, he asserted that he never went to Cannon's trailer and learned about the fire when the fire department arrived the next morning. (R. 705-06)

Soon, however, Miller changed his story and relayed a different false account. When Sandlin asked Miller to begin by describing the morning and work backwards to the previous evening, Miller became "frustrated and agitated," told

Sandlin "to forget all that, that that wasn't true," and asked if everyone but he and Sandlin could be removed from the room. (R. 706-07) After Miller's mother and juvenile officers left the room, Miller gave Sandlin a statement which Sandlin typed up for Miller to read and sign. (R. 706-07) In his new statement, Miller stated that on July 15th, his family was getting ready to go to bed in his trailer when "Cole" arrived to use the telephone. (R. 709-10) Miller then went to Cole's trailer where he saw some baseball cards that "looked like they were worth money." (R. 710) When Cole came back to his trailer around midnight for some spaghetti, Miller returned to Cole's trailer and took the cards. (R. 710) Miller said that around 2:00 or 3:00 a.m., he and Colby Smith had returned to Cole's trailer , where Miller had a beer and Cole had become so drunk that he had trouble standing. (R. 710) As a result, Miller said, Cole fell down, hitting his nose and lip on a table. (R. 710) Miller stated that when he tried to help Cole, Cole grabbed him by the throat. (R. 711) When Smith pushed Cole off of him, Cole grabbed a bat and hit Miller on the arm. (R. 711) According to Miller's statement, Smith then grabbed the bat from Cole and hit him on the arm. (R. 711) When Smith threw the bat down, Miller kicked it under the couch before landing Cole on the floor and punching him several times in the face. (R. 711) Seeing Cole's wallet on the floor, he took about $350 in cash and a driver's license for "things I want, I need, thing I don't have." (R. 711) When Miller's mother began knocking on the

front door and saying that the police were arriving, Miller and Smith ran out the back door, hearing Cole say, "why did you do this to me?" (R. 711-12)

Forensic pathologist Dr. Adam Craig initially performed an external examination on Cannon's body rather than a full autopsy. (R. 910-14) Not having received any indication that Cannon's death had resulted from a crime, Dr. Craig initially ruled that it had been an accident caused by the inhalation of smoke and soot. (R. 194, 925) Although Cannon's body was then buried, Sandlin requested that it be exhumed so that a full autopsy could be performed. (R. 726) On August 1, 2003, Dr. Craig performed a full autopsy, discovering injuries not caused by the fire – including a two-inch contusion to the left side of the forehead caused by blunt force and six rib fractures on both sides of the body. (R. 926-37) Dr. Craig was able to determine from hemorrhaging that these injuries occurred before Cannon died. (R. 935-36) Toxicology analysis showed Cannon's blood alcohol level to be .216 grams per 100 milliliters. (R. 941) Based upon these findings, Dr. Craig reaffirmed his initial finding that the cause of Cannon's death was "inhalation of products of combustion" but added that "multiple blunt force injuries and ethanol intoxication" were contributing factors because they made it more difficult to breath in the fire. (R. 939-40)

Later, Miller changed his story yet again. On July 31, 2003, and August 4, 2003, Deputy Tim McWhorter of the Lawrence County Sheriff's Department

transported Miller from one detention center to another. (R. 850-852) Although Deputy McWhorter engaged in "small talk" with Miller, he did not interrogate him, talk about the murder investigation, threaten him, or offer him any benefit for making any statement. (R. 851-85, 868-73) On July 31, Miller asked McWhorter "if he had previously told something that wasn't true but now wanted to go back and tell the truth, would he get in any trouble?" (R. 871) He also stated that he deserved "to do some time in a correctional facility, that he was not innocent and he had been involved in the assault on Mr. Cole Cannon." (R. 871) On August 4th, Miller told McWhorter that he "had been really messed up" when Cannon died, having taken two Klonopin and drunk most of a fifth of whiskey. (R. 873) He stated further that he and Smith went to Cannon's trailer when he told them that he had some acid, but when they got over there he would only discuss music. (R. 873-74) When they attempted to leave, Cannon grabbed Miller by the neck. (R. 874) Because he was "really pissed off," Miller then "slammed Mr. Cannon really hard." (R. 874) Miller knew that the autopsy had to show marks and bruises because "they had roughed him up pretty good." (R. 974) Contrary to a rumor Miller had heard that there was $1700 in Cannon's wallet, they only found $300. (R. 874) Miller could not remember everything, but "the more he thought about it, the more it made him think he started the fire." (R. 874) Smith informed him the next morning that Cannon had died in the fire. (R. 875)

B. Procedural History

Even at the outset of the proceedings, the court system considered the effect of Miller's age—14, at the time of the murder—on the proper approach to his prosecution and punishment. In 2004, after a hearing at which he was represented by counsel, Miller was transferred from the Lawrence County Juvenile Court to the Lawrence County Circuit Court to be tried as an adult on one charge of capital murder during the course of an arson and on one count of capital murder during a robbery. (C. 25-27) In 2006, Miller was indicted by a grand jury for two counts of capital murder, one count for intentionally killing of Cole Cannon in the course of a first degree robbery in violation of Section 13A-5-40(a)(2) of the Code of Alabama and a second count for intentionally killing Cannon in the course of a first- or second-degree arson in violation of Section 13A-5-40(a)(9) of the Code of Alabama. (C. 10-11)

Miller was tried before a jury, in 2006. (R. 2, 263-1405) It returned a verdict of guilty of capital murder during the course of a first degree arson. (R. 1394) Based on Section 13A-5-39(1) of the Code of Alabama and in accordance with Roper v. Simmons, 543 U.S. 551 (2001), the trial court sentenced Miller to a mandatory term of life imprisonment without the possibility of parole. (R. 1396-99)

Miller later filed a postrial "Motion for a New Trial," arguing that sentencing a 14-year-old to life without the possibility of parole constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution and that the mandatory sentencing scheme under which he was sentenced violated the Eighth and Fourteenth Amendments. (C. 99-116) After holding a hearing on the motion, trial court denied it. (C. 8, 177; R. 14-1438) The Alabama Court of Criminal Appeals affirmed Miller's conviction and sentence, and the Alabama Supreme Court denied his petition for writ of certiorari. *Miller v. State*, No. 06-0741, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010); *Ex parte Miller*, No. 1091663 (Ala. Oct. 22, 2010).

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY THE WRIT CONCERNING WHETHER SENTENCING A FOURTEEN YEAR OLD CAPITAL MURDER DEFENDANT TO LIFE WITHOUT PAROLE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Although some aspects of this case admittedly render it a good vehicle for consideration of the first question presented, other considerations render this case thoroughly uncertworthy. On the one hand, this murder was as grisly as they come. If this Court is to consider whether the Eighth Amendment categorically bars the imposition of a sentence of life without the possibility of parole for a

juvenile offender, it should probably do so in a context like this one—where the extreme facts of the defendant's crime mean that he has no colorable argument that his sentence is unconstitutional absent a categorical rule forbidding this level of punishment for all offenders of his age. That said, this is still not the right case in which to grant certiorari on this issue. That is so in part because the Alabama Court of Criminal Appeals answered this question correctly. But even more importantly, this Court's decision in *Graham v. Florida*, 130 S.Ct. 2011 (2010), on which Miller's argument is premised, is of sufficiently recent vintage that there is no colorable argument that a consensus has developed, in the meantime, that its rationale categorically bars the imposition of life-without sentences for juvenile homicide offenders. Indeed, there is no split of authority among the lower courts on this issue, with the States uniformly concluding, thus far, that the Eighth Amendment does not bar this sentence for these offenders. Because death sentences are not at issue in this context, there is no need for the Court to consider this issue right away, and the law would benefit from more percolation on this issue before this Court definitively resolves it.

A. The lack of a split—or, for that matter, a meaningful opportunity for states to consider *Graham*'s application in this context—counsels heavily against granting certiorari.

Certiorari review is inappropriate on the question of whether it is constitutionally permissible to sentence a 14-year-old capital murder defendant to life without parole because this Court indicated that such sentences are constitutionally permissible in both *Roper v. Simmons*, 543 U.S. 551 (2005), and in *Graham v. Florida*, 130 S. Ct. 2011, (2010). Only five years have passed since *Roper*, and merely a year has passed since *Graham*. It would be imprudent to reconsider the lines drawn in these decisions at this juncture when the few courts that have considered the constitutionality of life without parole sentences for juvenile defendants convicted of homicide since *Graham* have held uniformly that such sentences are constitutionally permissible.

Although this Court has not expressly held that a juvenile could not be sentenced to life without parole for committing a homicide, it has drawn distinct lines indicating that such a sentence would be constitutionally permissible. In *Roper*, 543 U.S. at 572, this Court affirmed the lower court's decision imposing a life-without-parole sentence for a juvenile homicide offender instead of a death sentence. In *Graham*, meanwhile, this Court stated that "[t]here is a line 'between homicide and other serious violent offenses against the individual'" in the context of holding that the imposition of a life without parole sentence on a juvenile *non-*

homicide defendant was unconstitutional. 130 S.Ct. at 2027 (quoting *Kennedy v. Louisiana*, 547 U.S. 407, 128 S.Ct. 2641, 2659-60, (2008)). Indeed, this Court in *Graham* repeatedly made clear that its holding applied to non-homicide offenses alone. These cases, taken together, indicate that the sentencing of juvenile homicide defendants to life without parole is constitutionally permissible. Yet Miller now asks this Court to find his life without parole sentence to be cruel and unusual punishment under the Eighth and Fourteenth Amendments without allowing enough time for a significant number of lower courts to address this specific question in light of this Court's *Roper* and *Graham* decisions. This Court should reject that imprudent course.

The Court should do so in part because perhaps due to the recency of *Graham*, the lower courts are not split on this issue. All of the lower courts that have addressed the question of whether juveniles can be sentenced to life without parole under the Eighth Amendment for homicide have determined that such sentences are constitutional.

On the federal level, the few Circuit Courts of Appeal addressing the issue before *Graham* all held that life without parole or its equivalent was not cruel and unusual punishment when imposed on a juvenile for committing a homicide—including juveniles who were as young as 15 when they committed the crime. *See Rodriguez v. Peters*, 63 F.3d 546 (7th Cir. 1995) (rejecting Rodriquez's argument

that, because a "natural life" sentence was equivalent to a death sentence, imposition of such a sentence on a 15-year -old juvenile was disproportionate); *Rice v. Cooper*, 148 F.3d 747 (7th Cir. 1998) (holding that sentencing "illiterate and mildly retarded" 16-year-old who tossed bottle of gasoline into apartment killing four people to "natural life" was not cruel and unusual punishment.); *Harris v. Wright*, 93 F.3d 581, 584-85 (9th Cir. 1996)(holding that mandatory life-without-parole sentence imposed on 15-year-old convicted of aggravated first-degree murder was constitutional); *United States v. Pete*, 277 Fed.Appx. 730, 2008 WL 2019559, at *3 (9th Cir. 2008), (stating that "Pete's sentence of life imprisonment without parole [for convictions for second degree murder, felony murder, and conspiracy to commit murder] is not cruel and unusual punishment for a juvenile.").

Likewise, all of the state courts that have addressed the question before and after *Graham* have uniformly held that juvenile defendants who have been convicted of homicide—including defendants in some cases who were as young as 14—may be sentenced to life without parole under the Eighth and Fourteenth Amendments. *See State v. Ninham*, No. 2008AP1139, 2011 WL 1902136, at *22 (Wis. May 20, 2011)(" 14-year-old); *People v. Donald*, No. A121820, 2010 WL 2594940, at *19 (unpublished) (Cal. App. June 29, 2010), *review denied* (Oct. 20, 2010)(17-year-old); *State v. Kelly*, 46 So. 3d 229, 233-34 (La. App. 2010)

(mandatory life without parole sentence imposed on 15-year-old); *Meadoux v. State*, 325 S.W.3d 189, 193-96 (Tex. Crim. App. 2010) (16-year-old"); *State v. Andrews*, 329 S.W. 3d 369, 377-78 (Mo. 2010)(mandatory life-without parole sentence imposed on 15-year-old); *Gonzalez v. State*, 50 So. 3d 633, 635-36 (Fla. 1st DCA 2010)(16-year-old); *State v. Windom*, No. 36656, 2011 WL 891318, at *8-9 (Idaho Mar. 16, 2011) (16-year-old); *Wilson v. State*, No. 14-09-01040-CR, 2011 WL 1364972, at *5-7 (Tex. Crim. App. Apr. 12, 2011)(17-year-old.); *Paolilla v. State*, No. 14-08-00963-CR, 2011 WL 2042761 (Tex. Crim. App. May. 26, 2011)(17-year-old).

Other recent state-court decisions, though not citing the exact age of the juvenile defendant, have followed this same trend. *Jackson v. Norris*, No. 09-145, 2011 Ark. 49, 2011 WL 478600 (Ark. Feb. 9, 2011); *People v. Hernandez*, No. B223310, 2011 WL 539448, at *7 (unpublished) (Cal. App. 2 Dist. Feb. 17, 2011), rehearing denied (Mar. 2, 2011), review denied (Apr. 27, 2011); *Cox v. State*, No. CR-00-345, 2011 WL 737307, at *2 (Ark. Mar. 3, 2011); *Commonwealth v. Ortiz*, 2011 PA Super 56, 2011 WL 940769 (Pa. Super. Mar. 19, 2011).

Still other state courts have stated, in dictum, that the *Graham* rationale does not apply to juvenile homicide defendants, including those as young as 14. *People v. Cabanillas*, No. F058890, 2011 WL 1143230, at *28 (unpublished) (Cal. App. 5 Dist. Mar. 30, 2011), review filed (May 4, 2011)("[e]ven assuming arguendo that

appellant's enhanced term-of-years sentence was a *de facto* LWOP sentence, *Graham* is still inapplicable here because the Court expressly limited its holding to juveniles sentenced to LWOP for *nonhomicide* offenses."); *People v. Soto*, No. C060566, 2011 WL 1303400, at 21-23 (unpublished) (Cal. App. 3 Dist. Apr. 6, 2011), rehearing denied (Apr. 22, 2011), review filed (May 16, 2011)(while the court agreed that 14-year-old defendant's sentence "amount[ed] to a *de facto* LWOP sentence," it stated that to hold that such a sentence was grossly disproportionate to his crimes – one count of premeditated murder and several counts of premeditated attempted murder – "would be insulting to the victims and their families."); *State v. Golka*, 796 N.W. 2d 198, 215-16 (Neb. 2011)(Nebraska Supreme Court held that 17-year-old's consecutive life sentences for two counts of first-degree murder were permissible under *Graham*.). Accordingly, Miller cannot cite any split or disagreement among the lower courts as a compelling reason to grant certiorari.

Indeed, in light of the lack of a split on this issue, a grant of certiorari at this point would not be prudent. No significant developments since *Roper* and *Graham* have occurred that would signal the emergence of a national consensus against the imposition of life without parole sentences on juvenile homicide defendants. While Miller cites three states that have recently abolished life without parole for 14-year-olds, in light of the overwhelming majority of states that currently allow for such

punishment, such a "trend" does not show that there is currently a national consensus that the punishment is cruel and unusual. As Miller's own statistics attest, 36 states permit sentencing 14-year-olds to life without parole. *Miller v. State*, No. CR-06-0741, 2010 WL 3377692, at *5 (Ala. Crim. App. Aug. 22, 2010). Likewise, the studies relied on by Miller are either the same studies relied on by this Court in *Roper* or reach the same conclusions as those studies regarding the criminal culpability of juveniles generally, as opposed to 14-year-olds.

B. The decision below was correct.

Moreover, this Court need not grant certiorari here because the decision below—like the legion of other lower-court decisions addressing this issue generally—was correct. In attempting to create a new category in which life without parole sentences cannot be constitutionally imposed, Miller bears a "heavy burden." *See Gregg v. Georgia*, 428 U.S. 153, 175 (1976)("[A] heavy burden rests on those who would attack the judgment of the representatives of the people [concerning the appropriateness of punishment for crime]."). Miller has not met that burden. As noted below, both *Roper* and *Graham*—as well as this Court's decision in *Kennedy v. Louisiana* 547 U.S. 407 (2008)—drew a categorical line that is critical here: the Court found that non-homicide offenders are categorically less culpable than homicide offenders. It follows from that premise that if life with

parole is the maximum punishment a juvenile homicide offender can receive, then the categorically more culpable homicide offender must be subject, for Eighth Amendment purposes, to the categorically more severe sentence of life without the possibility of parole. Moreover, Miller's argument for a "consensus" here bypasses what this Court termed in *Graham*, 130 S.Ct. at 2023, "the clearest and most reliable objective evidence of contemporary values," namely, "the legislation enacted by the country's legislatures." In its opinion below, the Alabama Court of Criminal Appeals analyzed both actual legislation and actual sentencing practices to determine whether a national consensus existed. The court found that "according to the statistics submitted by Miller, 36 states permit a sentence of life in prison without the possibility of parole for offenders who were 14 years of age or younger at the time of the offense." *Miller v. State*, No. CR-06-0741, 2010 WL 3377692, at *5 (Ala. Crim. App. Aug. 22, 2010).

Miller now concedes that "most states have statutory schemes that theoretically permit a life without parole sentence for a fourteen year old child," but assumes that most of these states only permit such a sentence because they allow for the transfer of children to adult court and allow life without parole sentences for adults. Petition, p. 21. In other words, Miller claims that the legislatures of these states do not know the consequences of their actions in light of the entire legal framework. This assumption goes directly counter to this Court's assumption that

legislatures understand the consequences of the interplay of specific acts with the surrounding legal landscape. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 111 S.Ct. 317, 325 (1990)("We assume that Congress is aware of existing law when it passes legislation."). In fact, the Alabama Legislature made it clear that it knew the consequences of passing its juvenile transfer statute, as Section 12-15-34(h)(1) provides that "[a] child whose case is transferred for criminal prosecution shall not be granted youthful offender status and, if convicted, shall be sentenced as an adult if the act which if committed by an adult would constitute [a capital offense]." Rather than rely on legislative action to evince consensus, Miller asserts "the extreme rarity with which life without parole sentences are imposed on fourteen-year-old children," citing to the bare number that only 73 14-year-olds have been sentenced to life without parole in the United States. Petition, p. 19. But as the Court of Criminal Appeals noted below, Miller fails to show the relevance of his bare statistic that 73 14-year-olds have received life without parole sentences because he does not tie it to any other relevant statistic. Miller states that "[o]f the 3,632 children age fourteen or younger arrested for homicide since 1990, less than two percent of these children were sentenced to life imprisonment without parole." But the Court of Criminal Appeals discounted the importance of this overly broad baseline for a comparison, reasoning that a comparison with 14-year-olds convicted of *capital or aggravated murder* would have been more meaningful. *Miller*, 2010

WL 3377692, at *5-6. The Court of Criminal Appeals found this evidentiary failing substantial, and that failing alone militates strongly against certiorari here. If this Court decides to consider this issue it some point, it should be in a case in which the petitioner has developed the record more fully. In accordance with this conclusion, the low number of 14-year-olds who have been sentenced to life without parole is a reflection of the fact that 14-year-olds rarely commit crimes heinous enough to warrant such punishment.

The heinousness of Miller's own murder of Cole Cannon, uncommon for that of a crime committed by a 14-year-old, demonstrates the rare circumstance under which a life without parole sentence is appropriately imposed on such a young defendant. As recounted by the Court of Criminal Appeals, the evidence at trial showed that Miller intentionally killed Cannon by beating him with a baseball bat repeatedly and setting his trailer on fire after his plan to steal his wallet did not go smoothly. *Miller*, 2010 WL 3377692, at *1-3. This Court found in *Solem v. Helm*, 463 U.S. 277, 288-90, n. 15 (1983), that "clearly no sentence of imprisonment would be disproportionate" for the crime committed in *Enmund v. Florida*, 458 U.S. 782 (1982)– "felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used." Even if a sentence of imprisonment could be deemed disproportionate to a murder conviction in certain cases, Miller's case does not illustrate such a situation. Miller

has failed to show that his own sentence is disproportionate to his crime, much less that life without parole sentences are categorically disproportionate when imposed on 14-year-old capital murder defendants.

As a final matter, Miller has not set forth the sort of statistical data, focused on defendants who are 14-year-old and younger, that would help the Court decide the question as he has chosen to frame it. Miller relies on much of the same studies this Court cited in *Roper* and *Graham*. But those studies focused on all juveniles, and not simply juveniles under the age of 15. In *Roper*, 543 U.S. at 569, this Court cited to Laurence Steinberg and Elizabeth S. Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003), for the proposition that juveniles as a class have less control over their environment than do adults. Curiously, Miller cites this very same study for the proposition that "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature *well into late adolescence*." (Emphasis added.) Petition, p. 15, n. 10. Miller cites a more recent study conducted by Steinberg to show that there is a "period of heightened vulnerability to risk taking during middle adolescence," Steinberg, however, specifically warns in the same study that "[w]hen lawmakers

focus on juvenile justice policy, the distinction between adolescence and adulthood, rather than that between childhood and adolescence, is of primary interest." Petition, p. 16, n. 13, citing Laurence Steinberg, Adolescent Development and Juvenile Justice, Annu. Rev. Clin. Psychol. 2009. 5:47-73, at 54; Steinberg, Adolescent Development and Juvenile Justice, at 53. If defendants like Miller are to advance the position that life-without sentences are unconstitutional as to a narrower subset of juveniles, this Court should not grant certiorari on that issue absent some indication that their evidence draws the distinction they are attempting to impose on the Eighth Amendment.

II. THIS COURT SHOULD DENY THE WRIT CONCERNING WHETHER A MANDATORY LIFE WITHOUT PAROLE SENTENCE IMPOSED ON A FOURTEEN YEAR OLD CAPITAL MURDER DEFENDANT.

For largely the same reasons, this Court should deny certiorari on the second question presented as well. Miller argues that his life without parole sentence is unconstitutional because it was imposed pursuant to a mandatory sentencing scheme which precluded the consideration of mitigating evidence. Petition, pp. 26-30. This Court in *Harmelin v. Michigan*, 501 U.S. 957 (1996), however, reached the conclusion that mandatory sentencing schemes were not reviewable except in death-penalty cases. Furthermore, contrary to Miller's claim, mitigating factors such as his age were considered when he was transferred from juvenile to adult

court – proceedings which he does not challenge. Because Miller has failed to cite any compelling reason for overturning this Court's decision in *Harmelin*, this Court should deny his petition for certiorari review concerning this issue.

While this Court has previously considered the constitutionality of mandatory sentencing schemes under the Eighth and Fourteenth Amendments, it has drawn a distinct line between cases involving the death penalty and those not involving the death penalty. In Part IV of the majority opinion in *Harmelin*, 501 U.S. at 996, the Court stated, "[w]e have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further." Because Miller did not receive the death penalty, his claim that the mandatory sentencing scheme precluded the consideration of mitigating factors fails to show that his sentence constituted cruel and unusual punishment or violated his due process rights.

Contrary to Miller's claim that Alabama's mandatory sentencing scheme precluded the consideration of mitigating factors such as his age, such factors were considered when he was transferred from juvenile to adult court. According to Section 12-15-34(d) of the Code of Alabama, a juvenile court must consider various factors when determining whether to transfer a juvenile to adult court, including "[t]he nature of the present offense, [t]he extent and nature of the prior delinquency record of the child, [t]he nature of past treatment efforts and the nature

of the response to the child to the efforts, [d]emeanor, [t]he extent and nature of the physical and mental maturity of the child, [and t]he interests of the community and of the child requiring that the child be placed under legal restraint or discipline." While this list of factors does not expressly require that the juvenile's "age" be considered, it does require the consideration of the juvenile's "physical and mental maturity," which is a more complete and individualized consideration than the bare statistic of the juvenile's age.

Not only was Miller transferred under Section 12-15-34(d), but he has failed to argue that this statute or his transfer proceedings failed to protect his rights when being prosecuted as an adult. In *Ex parte E.J.M.*, 928 So. 2d 1081, 1085, 1088 (Ala. 2005), the Alabama Supreme Court affirmed Miller's transfer proceedings, noting that a transfer hearing was conducted at which Miller was represented by counsel and a psychological evaluation was conducted at state expense. It must be presumed that the juvenile court was aware of the severity of Miller's crime and the possibility that he could receive life without parole if transferred to adult court. Because Miller has not contested these proceedings or argued that the juvenile court's consideration of the relevant factors was insufficient to justify his transfer to adult court, he may not now challenge the mandatory nature of his sentence, which only became mandatory once he was transferred and convicted. Petition, pp. 26-30.

Miller has asserted no split on this issue, and the Alabama Court of Criminal Appeals' decision on this front is consistent with the decisions reached by other courts. In *State v. Andrews*, 329 S.W.3d 369, 377-78 (Mo. 2010), the Missouri Supreme Court held that Missouri's mandatory life without parole sentence imposed on a 15-year-old juvenile convicted of first degree murder was not unconstitutional when the Missouri's juvenile-certification statute required the juvenile court to consider "[t]he age of the child" among other relevant factors when determining whether such juveniles are to be transferred to adult court. Likewise, because the juvenile court was required to consider Miller's physical and mental maturity before transferring him to be tried as an adult, Miller cannot argue that the mandatory nature of his life without parole sentence violated the Eighth and Fourteenth Amendments.

Other courts, furthermore, have uniformly upheld the constitutionality of mandatory life without parole sentences imposed on juveniles. See *Paolilla v. State*, No. 14-08-00963-CR, 2011 WL 2042761 (Tex. Crim. App. May. 26, 2011); *Meadoux v. State*, 325 S.W.3d 189, 193-96 (Tex. Crim. App. 2010); *Wilson v. State*, No. 14-09-01040-CR, 2011 WL 1364972, at *5-7 (Tex. Crim. App. Apr. 12, 2011); *State v. Kelly*, 46 So. 3d 229, 233-34 (La. App. 2010); *Forcey v. State*, No. 10-09-00335-CR, 2010 WL 2010942, at *1-2 (unpublished) (Tex. App. May 19, 2010); *Culpepper v. McDonough*, No. 8:07-cv-672-T-17TGW, 2007 WL 2050970,

at *4-5 (unreported)(M.D. Fla. Jul. 12, 2007); *Phillips v. State*, 807 So. 2d 713, 715-20 (Fla. 2nd DCA 2002); *People v. McKinney*, No. 1777618, 1997 WL 33350488, at *2 (unpublished)(Mich. App. 1997); *Harris v. Wright*, 93 F.3d 581, 584-85 (9th Cir. 1996); *People v. Perry*, 554 N.W.2d 362, 371-74 (Mich. App. 1996); *People v. Edwards*, No. 182297, 1996 WL 33347690, at *1 (unpublished)(Mich. App. Dec. 17, 1996); *People v. Launsberry*, 551 N.W. 2d 460, 463-64 (Mich. App. 1996); *Rodriguez v. Peters*, 63 F.3d 546, 567-68 (7th Cir. 1995).

This case is also an exceedingly poor vehicle for considering this second question presented. Miller's crime was exceedingly grisly—so grisly, in fact, that Miller has not argued that he could prevail under a traditional Eighth Amendment proportionality analysis and instead seeks refuge in a categorical prohibition on this punishment. Thus, even if the mandatory nature of the penalty were relevant for Eighth Amendment purposes—and it is not—Miller would receive the same punishment in the end. If there is a proper vehicle for reviewing this question, it should be in a case in which a defendant has a colorable argument that his life-without-parole sentence is constitutionally disproportionate under a traditional proportionality analysis.

CONCLUSION

For the reasons outlined above, this Court should deny Miller's petition for a writ of certiorari.

Respectfully submitted,

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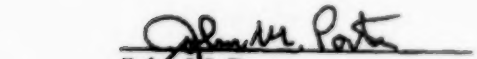
Attorney General
By:

John Neiman
Solicitor General



John M. Porter
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June 2011, a copy of the foregoing was served on the attorneys for the Petitioner by placing the same in the United States Mail, first class, postage prepaid, and addressed as follows:

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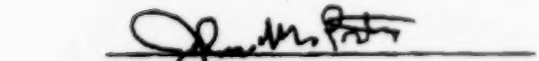

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1149616

REPLY BRIEF

No. 10-9646

IN THE SUPREME COURT OF THE UNITED STATES

EVAN MILLER, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRYAN A. STEVENSON
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June 9, 2011

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Alabama does not dispute any of the essential facts on which Evan's petition relies: (1) that Evan was only fourteen-years-old at the time of the underlying offense; (2) that there are only seventy-three children fourteen or younger who have been sentenced to life imprisonment without parole; and (3) that these children are serving their sentences in only eighteen states. (Pet. Cert. 2–4.) Alabama also does not meaningfully dispute that fourteen-year-olds have significant psychosocial and neurological differences from older teens and adults, or that the law treats fourteen-year-olds differently from older teens and adults.[1] (Pet. Cert. 12–19.)

As laid out in detail in Evan's petition, this Court should grant review in this case to address important constitutional questions left open by this Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), regarding the imposition of a mandatory life-without-parole sentence on a fourteen-year-old child convicted of homicide. Under the reasoning of Roper and Graham, the identical analysis logically compels the conclusion that consigning a

[1] Although Alabama notes that two of the over thirty studies relied on in Evan's petition found distinctions between older juveniles and adults, the State does actually assert that these studies did not find significant distinctions between young adolescents and older teens nor does it address the numerous additional studies cited. (Resp't's Br. Opp'n 20–21.)

fourteen-year-old child to die in prison through a life-without-parole sentence categorically violates the Eighth and Fourteenth Amendments to the United States Constitution.

I. THIS COURT SHOULD GRANT REVIEW IN THIS CASE BECAUSE THE ISSUE PRESENTED IS EXCEPTIONALLY IMPORTANT AND THE EXTREME RARITY OF THE SENTENCE AT ISSUE MEANS A JURISDICTIONAL SPLIT IS UNLIKELY.

This Court should grant review to address the important issues of federal law decided by the lower court in this case. See Sup. Ct. R. 10(c) (listing, as reason for granting certiorari review, that "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court"); see also Sup. Ct. R. 10 ("The following [subparagraphs], although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers . . . .").

Although Alabama suggests that "in light of the lack of a split on this issue, a grant of certiorari at this point would not be prudent" (Resp't's Br. Opp'n 15), the State ignores the extreme rarity with which these sentences are imposed. The seventy-three children fourteen or younger serving sentences of life imprisonment without parole represent the total accumulation of such sentences over the past several decades. (Pet. Cert. 20.) The vast majority of these children have exhausted their appeals without ever receiving any meaningful judicial review of their sentences.

In the past few years, only four such sentences have been imposed in only three

states.[2] With such a small number of cases that could serves as the vehicle for review of this issue, there is little possibility that a delay in addressing it will yield any greater diversity of lower court opinions. No child fourteen or younger has been sentenced to life without parole in the federal system, so it is doubtful that any federal circuit court will ever have the opportunity to address such a sentence on direct review. Even in most of the eighteen states that have imposed such sentences, future appellate opinions on this issue are highly unlikely. In two-thirds of these states, no child fourteen or younger has been condemned to die in prison in over ten years. Thus, at most a handful of jurisdictions are likely to ever address the application of Graham to this important issue.

The timing of this Court's decision to address the constitutionality of Evan's sentence is not inconsequential. If this Court does not grant review in this case, Evan will not only be deprived of hope for release. He will also be denied access to rehabilitative programs and services during critical developmental years that are not available to inmates sentenced to life without parole. See Graham, 130 S. Ct. at 2030 (citing Brief for Sentencing Project as Amicus Curiae Supporting Petitioner 11–13). He will spend those years in a maximum security adult prison where he faces an increased risk of physical and sexual assault by older inmates. See 42 U.S.C. § 15601(6);

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[2] See Cherie Ward, Teenager guilty of murder, is given life without parole, Mobile Press Register, July 31, 2010, at A1 (14-year-old Tevin Benjamin sentenced to life without parole in Mississippi); Teen Found Guilty of Killing Toddler Appeals His Sentence, KCRG TV-9 News, Dec. 10, 2010 (14-year-old Edgar Conception sentenced to life without parole in Iowa); L.L. Brasier, Teens Sent to Prison for Life, Detroit Free Press, Dec. 3, 2009, at A8 (14-year-olds Thomas McCloud and Dontez Tillman sentenced to life without parole in Michigan).

National Prison Rape Elimination Commission Report 16–19, 70–71, 140–59 (2009). Indeed, during the first months of his incarceration, Evan was attacked by an older inmate and stabbed nine times.[3] By contrast, if he had a parole-eligible life sentence, Evan could be incarcerated in a lower-security, safer facility and would have access to a variety of classes and programs for which he is currently ineligible.

The constitutional question of whether a fourteen-year-old child should be subject to a sentence of life imprisonment without parole is a compelling and important one. The unusual nature of this sentence makes lower court review infrequent but it is a challenging constitutional question that has recently divided several state courts. Recently, in State v. Ninham, No. 2008AP1139, 2011 WL 1902136 (Wis. May 20, 2011), the Wisconsin Supreme Court split over the question of whether sentencing a fourteen-year-old child to die in prison violates the Eighth Amendment. Two justices of that court found that "[a]pplying the analyses the Supreme Court applied in Graham and Roper, consistent with the analysis the Court applied in Atkins and Thompson, and the historic recognition under Wisconsin law of the vulnerability of young juveniles, . . . a death-in-prison sentence for an intentional homicide committed when a juvenile is 14 years old or younger is unconstitutional." Id. at *26. However, a majority voted to uphold the sentence. Id. at *18.

Similarly, in Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011), three justices of the Arkansas Supreme Court expressed concern about the mandatory

---

[3]The violence that Evan has experienced in adult prison is discussed in the DVD: Sentencing 13- and 14-Year-Old Children to Die in Prison (Equal Justice Initiative 2010).

life-without-parole sentence imposed a fourteen-year-old for felony murder, but the majority found the Graham required upholding the sentence. Id. That already state court judges are disagreeing about the application of Graham to the imposition of a life-imprisonment-without-parole sentence on a fourteen-year-old child and many, like the lower court here, are refusing to acknowledge its implications for such sentences indicates that this Court's guidance will be required to properly resolve this issue.[4]

II. THE FACT THAT A DETERMINATION WAS MADE THAT EVAN SHOULD BE TRIED AS AN ADULT DOES NOT UNDERMINE THE NEED FOR THIS COURT TO REVIEW HIS MANDATORY SENTENCE.

At the time Evan was sentenced, the sentencer had no discretion to impose any sentence other than life without parole. The trial judge who imposed that sentence specifically stated that "the Court has no other option or discretion in that." (R. 1399.) Evan has argued in his petition for certiorari that such a mandatory sentence, which prevents any consideration of Evan's age and other mitigating circumstances in determining his sentence violates the Eighth and Fourteenth Amendments. (Pet. Cert. 26–30.)

Although the State does not directly dispute that no decision-maker has ever made a determination that life-without-parole is the appropriate sentence in this case, the State suggests that, because a juvenile court judge was permitted to consider mitigation in determining whether to transfer Evan's case to adult court, his sentence

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[4]Although Alabama cites to long list of cases that it claims have rejected the issue presented here, it is clear from the State's own parentheticals that, other than Jackson and Ninham, all of these cases are inapposite because they involve older juveniles, do not involve true sentences of life without parole, or were decided prior to Graham. (Resp't's Br. Opp'n 12–15, 24–25.)

was somehow not mandatory. (Resp't's Br. Opp'n 21–23.) The State's argument is contradicted by this Court's precedent which has made clear that transfer decisions are not equivalent to sentencing decisions because there are a number of other reasons for trying serious juvenile offenders as adults:

> The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders.

Thompson v. Oklahoma, 487 U.S. 815, 850 (1988) (O'Connor, J. concurring); see also id. at 826 n.24 (Stevens, J. plurality op.) (finding existence of statutes permitting trial as an adult "tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders."). In Graham, this Court rejected a similar argument, finding that "the [transfer] provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue." 130 S. Ct. at 2031; see also id. at 2025.

Evan does not contend that Alabama is prevented from determining that a homicide offense committed by a fourteen-year-old cannot adequately be addressed within the state's juvenile justice system, whose jurisdiction extends only until age twenty-one, Ala. Code § 12-15-117; rather, he contends that once that determination is made, at a minimum, his age is still constitutionally relevant to the ultimate sentence that is imposed. It is precisely the false dichotomy urged by Alabama between the limited jurisdiction of the juvenile court and a mandatory sentence of life without parole that exacerbates the constitutional deficiency here. This Court should

grant certiorari to make clear that it is not sufficient to simply consider age at some point, but that the sentencer must be permitted to consider age and other mitigating circumstances when determining the appropriate sentence for a fourteen-year-old offender.

CONCLUSION

For the foregoing reasons, Petitioner prays that the Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully submitted,

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June 9, 2011

JOINT APPENDIX

FILED
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No. 10-9646

In The
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Alabama Court Of Criminal Appeals

JOINT APPENDIX

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Certiorari Granted November 7, 2011

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IN THE CIRCUIT COURT
OF LAWRENCE JUDGE: APR

STATE OF ALABAMA VS MILLER EVAN
CASE: CC 2006 000068.00 7768 CO RD 87
MOULTON, AL
35650 0000

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01/18/2006	DEFENDANT ARRESTED (AR01) ON: 01/17/2006	ROH
01/18/2006	CHARGE 02: MURDER (AR01) CAPITAL-ARSON/ #CNTS: 001	ROH
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Alabama Court of Criminal Appeals Docket Sheet

CR-06-0741 APP: State Conviction CR-06-0741

Evan Miller v. State of Alabama
(Appeal from Lawrence Circuit Court: CC06-68)

03/12/2007	Comp. of Reporter's Transcript Certified (Throneberry).
03/16/2007	Record on Appeal Filed; Volumes: 9. Date of Certificate: 03/15/2007
04/16/2007	Supplemental Record on Appeal Filed; Volumes: 1. Date of Certificate: 04/13/2007
06/06/2007	Appellant's brief & O.A. Request Filed
07/19/2007	Appellee's Brief Filed
08/08/2007	Oral Argument Scheduled for 01/22/2008 at 9:30 a.m.
08/09/2007	Appellant's Reply Brief Filed
01/22/2008	Argued and Submitted
06/25/2010	Affirmed. (Windom) (Opinion) Wise, P.J. Concurs, Welch, J. Concurs in the Result, Kellum, J. Concurs, Main, J. Concurs
07/16/2010	Application for Rehearing Filed. Brief in Support also filed.

08/27/2010	**Opinion of June 25, 2010, Withdrawn; Opinion Substituted; Affirmed; Application for Rehearing is Overrulled. (Opinion) Wise, P.J. Concurs, Welch, J. Concurs, Kellum, J. Concurs, Main, J. Concurs**
10/22/2010	**Petition for Certiorari Denied. SC Case #: 1091663.**
10/22/2010	**COJ Issued by SC. SC Case #: 1091663.**
10/22/2010	**Certificate of Judgment Issued**

1091663 **Alabama Supreme Court** 1091663
Docket Sheet

CRC: Petition for Writ of Certiorari to the Court of Criminal Appeals

Ex parte Evan Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Evan Miller v. State of Alabama.)

(Lawrence Circuit Court: CC06-68; Criminal Appeals: CR-06-741).

Petition Filed: 09/10/2010

09/13/2010 Cert petition EFiled.

10/22/2010 Certificate of Judgment Issued.

APPLICATION FOR YOUTHFUL OFFENDER STATUS AND ORDER OF INVESTIGATION

(Filed Feb. 9, 2006)

State of Alabama
Unified Judicial System

Case Number
CC 2006-68

THE Circuit **COURT OF** Lawrence, **ALABAMA**
(County)

STATE OF ALABAMA v. Evan Miller, **DEFENDANT**

Comes now the defendant in the above-styled cause and makes application for youthful offender treatment:

1. I am 17 years of age. Date of Birth: 11-2-88

2. I am represented by my attorney and he has discussed my case with me. I have had enough time to talk with my attorney about the facts of my case and he/she has explained my constitutional rights to me (see reverse side). I am satisfied with the services of my attorney and I have no complaints as to the way he/she has handled my case.

3. I understand that I am eligible to apply for treatment as a youthful offender. I understand that if I waive my right to a trial by jury and consent to be tried by the court without a jury and treated as a youthful offender, the court will cause me to be investigated and examined by the court and the court, in its discretion, may direct that I be arraigned and tried as a youthful offender.

4. I understand that if I am adjudged by the court to be a youthful offender, the court, in its sole discretion, may do any of the following:

   a. Suspend the imposition or execution of sentence with or without probation; or

   b. Place me on probation not to exceed three (3) years, prescribing such terms of probation as the court, in its sole discretion, may deem proper; or

   c. Impose a fine as provided by law with or without probation or commitment; or

   d. Commit me to the custody of the Board of Corrections for a term of three (3) years or for a lesser term or where a sentence or fine is not otherwise authorized by law, in lieu of or in addition to any such fine, the court may also impose a fine not to exceed $1,000.

   e. If the underlying charge is a misdemeanor, I may be given correctional treatment as provided by law for such misdemeanor.

5. I certify that I have not been threatened or abused or offered any inducement or reward to get me to make this application. I further understand that the punishment I receive is in the sole discretion of the court, although the court may in its discretion accept recommendations of punishment from the District Attorney.

6. With a full understanding of the foregoing, I hereby waive my right to a trial by jury and consent to be examined by the court, or such agency as the court may direct, and I further consent to

be tried by the court, without a jury, should the court direct that I be treated as a youthful offender.

2-2-06 /s/ Evan James Miller
Date Defendant

Comes the attorney for the above named defendant and certifies that on this date, the above information was read by the defendant in my presence, or was read to him/her by me, that I discussed these matters with the defendant in detail, and that I concur in this petition.

2-2-06 /s/ Chris Malcom
Date Attorney
Attorney Code MAL017

ORDER

It is ORDERED that the Parole and Probation Office in this County make an investigation of the defendant in accordance with the *Code of Alabama* 1975.

It is further ORDERED that a hearing is set on said Petition on (date) 26 APRIL 2006 at (time) 9:00 AM.

2 Feb 2006 /s/ Philip Reich
Date Judge

Court Record (Original) **Defendant** (Copy)
Attorney (copy) **Probation Office** (Copy)

STATE OF ALABAMA, PLAINTIFF VS. EVAN MILLER, DEFENDANT.	))))))	IN THE JUVENILE COURT OF LAWRENCE COUNTY, ALABAMA. CASE NUMBER: CC-06-68

MOTION

(Filed Mar. 3, 2006)

Comes now the State of Alabama by and through the District Attorney for the 36th Judicial Circuit and moves the Court to deny as a matter of law the above styled Defendant's application for Youthful Offender Status in that;

1. The Defendant is presently charged with capital murder
2. The Defendant was transferred by the Juvenile Court of Lawrence County, pursuant to Section 12-1534 of the Code of Alabama to the Circuit Court for trial as an adult. See State's Exhibit "A".
3. A child whose case is transferred for criminal prosecution shall not be granted Youthful Offender Status and shall be sentenced as an adult if the act which if committed by an adult is a capital offense. Section 12-15-34(h). JFB vs. State 729 So. 2nd 355(1998).

WHEREFORE the State of Alabama would move the Court of deny as a matter of law the Defendant's application for Youthful Offender Status.

Respectfully submitted this 3 day of March, 2006.

/s/ Jim Osborn
JIM OSBORN, District Attorney
36th Judicial Circuit of Alabama

[Certificate Of Service Omitted In Printing]

EXHIBIT A

STATE OF ALABAMA Plaintiff, VS. EVAN JAMES MILLER, Defendant.	)	IN THE DISTRICT COURT OF LAWRENCE COUNTY, ALABAMA. JUVENILE DIVISION CASE NO. JU01-163.08, JU01.163.09

ORDER

(Filed Mar. 2, 2004)

This matter coming on to be heard on the 27th day of February, 2004 upon a motion filed by the State of Alabama requesting this Court transfer the child, Evan James Miller to the Circuit Court of the Thirty-Sixth Judicial Circuit for criminal prosecution. The Defendant appearing along with his mother, Susan Miller, and being represented by his attorneys Chris Malcom, and Errek Jett, and the State of Alabama appearing by and through the District

Attorney for this Circuit, the Honorable Jim Osborn and Assistant District Attorney, Bob Lang, this Court proceeded to take evidence concerning the State's motion.

In determining whether to grant the State's motion to transfer, this Court considered evidence of all relevant factors including the following:

(1) The nature of the present alleged offense;

(2) The extent and nature of the Defendant's prior Delinquency record;

(3) The nature of past treatment efforts and the nature of the Defendant's response of such efforts;

(4) Demeanor;

(5) The extent and nature of the Defendant's physical and mental maturity; and

(6) The interest of the community and of the child requiring that the child be placed under legal restraint or discipline.

and having taken testimony took said cause under advisement.

This Court, after due consideration of all relevant evidence finds as follows:

(1) That the Defendant, Evan James Miller was Fourteen (14) years of age at the time of the conduct charged, and is alleged by petitions to have committed

the offenses: One (1) count Murder Capital-Robbery, One (1) count Murder Capital-Arson, which would constitute a crime under the laws of the State of Alabama if committed by an adult.

(2) That there is probable cause to believe that the Defendant may have committed the offenses charged and that the applicable allegations are true and correct.

(3) That it is in the best interest of the public to proceed with the disposition of these cases as a criminal prosecution.

(4) That the probation services did a study and made a written report of relevant factors as required by law, and that this report was made available to both the State of Alabama and the Defendant.

(5) This Court further finds that there are no reasonable grounds to believe that the Defendant is committable to an institution or an agency for the mentally retarded or mentally ill.

Based on the above findings this Court is of the opinion that the State of Alabama's motion to transfer the Defendant to the Circuit Court for criminal prosecution is due to be granted.

It is THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the Defendant, EVAN JAMES MILLER is hereby transferred from the District Court of Lawrence County, Juvenile Division, to the Circuit Court of the Thirty-Sixth Judicial Circuit, Lawrence County, Alabama for criminal prosecution

as an adult and that the case of the *STATE OF ALABAMA VS. EVAN JAMES MILLER* shall there be disposed of as a criminal case.

FURTHER all other Motions not previously ruled upon are hereby denied.

DONE AND ORDERED this the 2nd day of March, 2004.

/s/ R. H. Mullican
RANDEL H. MULLICAN, Judge

STATE OF ALABAMA, Vs Evan Miller, Defendant.	))))))	IN THE CIRCUIT COURT FOR LAWRENCE COUNTY, ALABAMA CASE NO: CC 2006-68

ORDER REGARDING YOUTHFUL OFFENDER

(Filed Aug. 12, 2006)

The defendant now being before the Court on the petition and consent to be considered as a youthful offender, and the Court considering the same, it is ORDERED and ADJUDGED by the Court that,

☐ Defendant's application for youthful offender status is GRANTED. The indictment presently pending is abated and done away with and defendant shall henceforth be handled as a youthful offender.

☐ Defendant is arraigned and enters a plea of not guilty of being a youthful offender. The case is set for trial on the _____ day _____, _____ at _____ a.m.

☐ Defendant is arraigned and requests to enter a plea of guilty to being a youthful offender.

☐ The Court having accepted defendant's plea to being a youthful offender adjudges defendant guilty and sentences him/her to the custody of the Director of the Department of Corrections for a term of _____. Defendant to pay $_____ Crime Victim's Compensation Fund Assessment, $_____ fine, $_____ restitution to _____, all court costs

and attorneys fees, if appropriate. All fines, costs and/or restitution may be paid in installments.

☐ The defendant's application for probation being granted, the sentence in this cause is hereby suspended and defendant is placed on probation for a term of _____ pending good behavior and his carrying out the conditions of the probation.

☐ Defendant is given a SPLIT SENTENCE: The defendant is spend _____ in the State Penitentiary/County Jail/Lawrence County Community Corrections, and then spend _____ on supervised probation.

☐ This case is DISMISSED, costs are (waived) (taxed to the defendant).

☐ Other: _____

⊟ Defendants application for youthful offender status is DENIED. The indictment presently pending against defendant shall proceed and be handled as other criminal indictments.

☐ Defendant enters a plea of not guilty/ waiver of arraignment. Case to be set for trial on _____. Plea day scheduled for _____.

⊟ Other: Arraignment hearing is scheduled for 27 April 2006 at 9:00 am

DATED: 26 April 2006 /s/ Philip Reich
PHILIP REICH,
Circuit Judge

IN THE CIRCUIT COURT OF LAWRENCE COUNTY, ALABAMA

STATE OF ALABAMA,

VS. **CASE NO: CC 2006-68**

JAMES EVAN MILLER,

DEFENDANT.

MOTION FOR DECLARATION THAT ALABAMA'S CAPITAL MURDER PROVISIONS IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE

(Filed Aug. 14, 2006)

Comes now the Defendant by and through undersigned counsel and moves this Honorable Court for the issuance of a declaration that Alabama's Capital Murder provisions are unconstitutional as applied in this matter. For cause your movant would show as follows:

1. The defendant is charged with two counts of capital murder in violation of Ala. Code § 13A-5-40(a)(2) and § 13A-5-40(a)(9) (1975, as amended).

2. The defendant was fourteen years of age at the time of the alleged offense.

3. Due to a recent U.S. Court decision the defendant is not eligible for the death penalty, thus the only possible punishment for a conviction to the charged offense is life without

the possibility of parole. *See Roper v. Simmons*, 543 U.S. 551 (2005).

4. The underlying principles in the *Roper* decision are rooted in the fundamental notion that juveniles lack the maturity of adults, and as such, subjecting a defendant who was a minor at the time of the offense would be violative of the defendant's right to due process and right against excessive punishment.

5. The same principles apply in the instant case where the defendant faces the prospect of life without parole for an offense committed when he was only fourteen (14).

WHEREFORE, PREMISES CONSIDERED, your movant prays this Honorable Court would declare Alabama's Capital Murder scheme unconstitutional as applied in this case.

RESPECTFULLY submitted this 14th day of August, 2006.

COUNSEL FOR THE DEFENDANT REQUESTS ORAL ARGUMENT ON THIS ISSUE

/s/ Errek Jett
Errek Jett (JET004)
Attorney for Defendant

/s/ Michael Terry
Michael F. Terry (TER002)
Attorney for Defendant

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DENIED

(Filed Sep. 21, 2006)

It is Further Ordered that the Clerk of the Court circulate copies of this ruling to parties by U.S. Mail, postage prepaid.
Dated this 25 day of August, 2006.

/s/ Philip Reich
Philip Reich, Circuit Judge

[Circuit Court of Lawrence County, Alabama,
State v. Miller, Case No. CC-2006-68]

(Filed Oct. 4, 2006)

[LOGO] TAYLOR HARDIN SECURE MEDICAL FACILITY
1301 JACK WARNER PARKWAY
TUSCALOOSA, ALABAMA 35404
205-556-7060 FAX: 205-556-1198

FORENSIC EVALUATION

Name:	**Miller, Evan James**		
Record #:	06 99 24 67	**Admission Date:**	Not applicable
SS #:	[Social Security Number Omitted]	**Commit. Status:**	OP-CST/MSO
Date of Birth:	11/02/88	**County:**	Lawrence
Gender:	Male	**Judge:**	Honorable Philip Reich
Race:	Caucasian	**Case #:**	CC2006-68
		Charge:	Capital Murder

Date of Evaluation: August 21, 2006

Date of Report: September 22, 2006

REFERRAL INFORMATION

Evan James Miller is a 17-year-old single Caucasian male who was evaluated at Taylor Hardin Secure Medical Facility (THSMF) pursuant to an order signed by the Honorable Philip Reich, Circuit Court Judge of Lawrence County, Alabama. The defendant

was ordered to undergo an evaluation of his competency to stand trial and his mental status at the time of the alleged offense of Capital Murder. He is incarcerated and was escorted to today's evaluation on a timely basis by the Sheriff's Department personnel.

NOTIFICATION

Before beginning the evaluation, the defendant was informed as to the purpose of the evaluation and the limited confidentiality involved. He was told that the results will be submitted in the form of a report to the Court, the defense attorney, and the District Attorney. He was also informed the results could be used in Court proceedings, either through testimony of the examiner and/or the written report, to assist reaching decisions concerning his competency to stand trial and his mental state at the time of the alleged offenses, but that none of the information could be used as evidence against him concerning his guilt on any charge. He acknowledged an understanding of the information imparted to him during the notification phase of the evaluation and signified his willingness to proceed with the evaluation by signing the notification form. His signature was witnessed by the examiner.

SUMMARY OF ALLEGED OFFENSE

The above-referenced case number refers to an event alleged to have occurred sometime between the evening hours of July 15, 2003 and the early morning hours of July 16, 2003. On July 16, the Sheriff's Department personnel responded to a call regarding a

fire in a mobile home at the Country Living Trailer Court. Evidently, the body of the victim was [2] discovered lying inside the door of the mobile home. Mr. Miller and another individual were identified as suspects in the case. The documentation alleges that the defendant and the other individual beat the victim with a baseball bat, stole money from the victim and set the mobile home on fire. It is further alleged that Mr. Miller also stole a collection of baseball cards from the victim. Apparently, the attempt to burn the mobile home was only partly successful, and the victim evidently died of smoke inhalation. Following investigative efforts, Mr. Miller was charged with Capital Murder and presently is incarcerated on those charges.

DATA SOURCES

The opinions and conclusions proffered in this report were derived from the following sources of information: (1) information concerning the alleged offense provided by the District Attorney's Office of Lawrence County, Alabama; (2) documentation from Decatur General Wes ; (3) prior psychological testing conducted with the defendant; (4) information gleaned during the previous evaluation from a phone interview with a Tennessee Valley Detention Center; (5) a previous forensic evaluation completed by Dr. Brent Willis; and (6) an interview with the defendant.

CLINICAL ASSESSMENT

Evidently, the defendant was raised by his mother and his stepfather until he was approximately ten years of age. At that time, he was sent to foster care, allegedly because his stepfather was physically and emotionally abusive to the defendant and the defendant's mother. Apparently, he returned to live with his mother at 12 years of age. It is noted that his stepfather was reported as being an alcoholic, as was his mother. He also reported that his mother was addicted to illicit drugs as well. He has previously indicated that he did not experience any abuse while living in foster care. He also reported that he has never been abused in any fashion by his mother. The defendant reportedly completed the seventh grade at an alternative school (Tennessee Valley Learning Center). Evidently, he was sent to the alternative school due to excessive truancy and physical altercations with other students. When questioned regarding the early termination of his academic career, he stated that he did not care whether he passed school or not, and apparently, as previously mentioned, skipped school excessively. He also stated that he did not pay attention in his classes, did not want to do the work and, reportedly, "hated" school. As previously mentioned, he had numerous physical altercations with other students, and he reported that he had a tendency to bully other children his age.

Mr. Miller has never been married and denies fathering any children. He has never been in the military and has no history of gainful employment. However,

he stated that he has worked occasionally cutting grass since the age of eight and occasionally earned money through "odd jobs."

Mr. Miller reported that he began drinking alcoholic beverages at approximately seven or eight years of age and went on to state that his stepfather gave him "sips of beer." He [3] reported that he first became intoxicated at 11 years of age at a New Year's party. He stated that he considers himself to be "a social drinker" but indicated that he has gotten drunk at parties approximately four or five times. He reported that he began using marijuana at approximately eight years of age. When questioned as to how he managed to procure marijuana at that age, he stated that he was able to get it from friends of his brother's. He stated that he did not smoke marijuana regularly at that time but indicated that he began using heavily by the time he was approximately 12 to 13 years of age. He stated that he was accustomed at that time to smoking marijuana several times a week. He reported that he used cocaine at 13 years of age but stated that he only used it approximately three times. He indicated that he has abused prescription medications (Xanax, Soma, Lortab, Lorcet, and Percodan) beginning at 13 years of age and stated that he was accustomed to using or abusing those medications on an everyday basis. He also reported that he has used crystal methamphetamines "countless times" beginning at age 13. He also has admitted to using Ecstasy, and further, reported that he has sniffed and huffed gas on at least one occasion each.

The defendant has previously reported that he has had four suicide attempts with the first of these occurring at age seven when he tried to hang himself; however, he reported that his father stopped him from doing so. He also has previously reported that he attempts to injure himself when he gets frustrated or angry and that he has also attempted to choke himself. These were self-injurious events that he reported to Dr. Willis, but Dr. Willis reported that the defendant vaguely described those events. In the current evaluation, he reported that he has tried to hang himself "a few times." Evidently, these events, if indeed they actually happened, took place at the detention center when he was approximately 14 years of age. He went on to report that he has, on numerous occasions, intentionally harmed himself to get attention. He also reported that he has engaged in self-harm for manipulative purposes. For example, he stated that he did so one time just to get the attention of a girl in whom he was interested.

Generally speaking, the defendant denied ever enduring any serious injuries, but stated that he broke his left arm at approximately seven years of age in a fall. He reported that he has no history of surgical interventions but stated that he has been diagnosed with and treated for Attention Deficit Disorder (ADD) and depressive mood. He stated that he first received treatment at approximately eight years of age. He was admitted later to Decatur General West on July 31, 2003 where he received the following diagnoses: Depressive Disorder, NOS; Oppositional Defiant Disorder;

Conduct Disorder; Rule Out Factitious Disorder; and Polysubstance Abuse. He also reported that he has received treatment for substance abuse on three different occasions with one of those treatments taking place at Decatur General West and the other two at Mountainview Hospital. He reported that, apart from his current charges, he has a legal history that includes commitment to a juvenile facility at one time for truancy. Further, he indicated that he began receiving counseling at six years of age, although he stated that he does not remember that but noted that his mother has told him that he received counseling at that age. Apparently, he was charged with breaking and entering an abandoned house at nine years of age and was charged with Criminal Mischief, Second Degree at 13 years of age.

[4] Mr. Miller was interviewed in the Visitor's Conference Room of THSMF on August 21, 2006 for the purpose of assessing his current mental status, his competency to stand trial and his mental state at the time of the alleged events. At that time, he appeared as a taller-than-average individual whose weight was appropriate to his stature. He was dressed casually in civilian clothing. When questioned as to why he was not wearing jail-issued garb, he stated that he had managed to procure some casual civilian clothing to wear, which he acknowledges is a violation of the jail rules. However, he went on to state "Who cares, it's jail. People break rules." His grooming and personal hygiene were adequate. He was poised and cooperated regularly with the interview process. However, he did

not seem to be overly concerned about the seriousness of his situation and took a rather lighthearted, jovial approach to the evaluation. Nonetheless, he was co-operative.

There were no significant impairments in memory functioning noted, and he was well oriented in all spheres. His attention and concentration capacity was good. His fund of general information was better than would be expected for his educational level. His abstract reasoning capacity was fair. His responses to questions intended to assess his insight and his judgment for hypothetical situations were appropriate. However, he noted that he previously would have given more anti-social responses to those questions and stated that he "got saved at 15," after his first evaluation. The implication of this was that, previously he would have given anti-social type answers in response to those hypothetical situations, but now (at least per his report), recognizes that he should do "the right thing." It is noted in Dr. Willis' evaluation report that Mr. Miller was previously administered the Wechsler Intelligence Scale for Children – III (WISC-III) in order to formally assess his level of intelligence. Dr. Willis reports that the results of the testing placed the defendant in the low-average range of general intelligence. Dr. Willis went on to state that there was no significant weakness noted and that Mr. Miller demonstrated "very few relative strength and weaknesses."

There were no impairments in receptive or expressive language functioning noted. His speech productivity

was within normal limits. He spoke in an expressive voice at a normal rate and was readily understood. There were also no impairments in thought processes noted. The structure of his thoughts was logical, relevant and goal-directed. He denied any current inclination to engage in self-injurious behaviors or aggression toward others. He denied currently experiencing any type of perceptual anomaly, such as auditory or visual hallucinations (hearing or seeing things that others do not hear or see). However, he stated that he has previously experienced auditory hallucinations while in the Tennessee Valley Detention Center. It is noted in Dr. Willis' report that Mr. Miller has previously indicated that he reported those hallucinations at one time as a means of manipulating his situation. During the current evaluation, there was no indication of any delusional thought content in his conversation, and none could be elicited through direct questioning.

Mr. Miller's motor-activity level was within normal limits, and no abnormalities of gait or posture were noted. He made good eye contact throughout the evaluation, and his use of other forms of non-verbal communication such as gestures, facial expressions and mannerisms was considered to be within normal limits and socially appropriate. When [5] questioned with respect to the quality of his mood, he stated that he is in "a great mood" and his mood appeared normal to the examiner. His affect was consistent with his mood and the topic of conversation. However, he stated that he had some difficulty sleeping but has been prescribed medications to help him sleep.

Nonetheless, he reported that his appetite is good, although he reported that the food in the jail setting is bad. He reported that he had some manic symptomatology in the form of excessive energy and indicated that he is not currently taking the Adderall he was previously prescribed for ADD.

PSYCHOMETRIC TEST RESULTS

As previously mentioned, Mr. Miller was previously administered the WISC-III, and his scores were reported to have fallen in the low-average range of general intelligence with no significant weaknesses noted as compared to other individuals his age. There were no relative strengths or weaknesses (as compared to the means of his own subtest scores). He also was administered the Minnesota Multiphasic Personality Inventory – Adolescent (MMPI-A) for diagnostic purposes. Those test results are quoted from the report authored by Dr. Willis: "The results of the MMPI-A appear to be valid, and therefore the results are interpretable. The clinical profile provided by the MMPI-A indicates that he is a type of individual who has serious problems with impulse control, anti-social behaviors and suicide attempts. His results were consistent with the information contained during the evaluation in that he has a history of school truancy, criminal behavior and substance abuse. His results also suggest that he should be considered a high risk for escape from the hospital unit. During the evaluation, Mr. Miller indicated that he is on suicide and escape risk where he is currently being held at the Tennessee Valley Detention Center."

DIAGNOSTIC IMPRESSIONS

I concur with the diagnostic impressions indicated in Dr. Willis' report. That is to say that Mr. Miller apparently was raised in an abusive and likely neglectful environment that was sorely lacking in adequate supervision. According to his report and the available documentation, he began abusing alcohol and illicit substances prior to his teenage years. He further had exhibited significant difficulties with behavior at school and has had prior involvement and difficulties with the legal system. He has previously been diagnosed with depression and reports numerous suicide attempts, although there is some likelihood that some of his suicidal gestures were manipulative in nature, as he readily admitted such. A perusal of all the documentation, including the testing and the various interviews and the history for Mr. Miller suggests that he is appropriate for the following diagnoses:

Axis I:	Conduct Disorder, Childhood-Onset Type Neglect of Child. Alcohol Abuse. Cannabis Abuse. Cocaine Abuse. (Rule Out) Crystal Methamphetamine Abuse.
[6] Axis II:	Personality Disorder, NOS with Anti-Social Features and Cluster B Traits.
Axis III:	Deferred

Forensic Assessment

COMPETENCY TO STAND TRIAL

Rule 11.1 of the Alabama Rules of Criminal Procedure (ARCrP) states that "A defendant is mentally incompetent to stand trial or to be sentenced for an offense if that defendant lacks sufficient present ability to assist in his or her defense by consulting with counsel with a reasonable degree of rational understanding of the facts and the legal proceedings against the defendant."

The defendant's ability to understand his current charge, assist an attorney in his defense and understand legal procedures was assessed through the use of the Competency to Stand Trial Instrument (CAI), a semi-structured interview format. The interview addresses issues considered to be relevant to and indicative of a reasonable degree of rational understanding of the facts of the case and legal proceedings pending against him as well his ability to assist in his defense.

The defendant is well aware of the charges pending against him. He also has an adequate appreciation of the range and nature of possible penalties. That is, he stated that he could possibly be given a sentence of life without the possibility of parole. When questioned as to whether or not he could receive the death penalty, he stated that his lawyer has advised him that he could not receive the death penalty. It is unclear to this examiner whether or not he actually could receive the death penalty but, nonetheless, if his opinion in this regard differs from objective reality, it does

not appear to be relevant to illogical or irrational thinking, but as previously mentioned (according to him) is based on the advice of his attorney. Nevertheless, he has an adequate appraisal of the likely outcome.

Mr. Miller understands the adversarial nature of a criminal proceeding in the sense that he understands that his attorney is responsible for advocating on his behalf and providing him guidance and counsel throughout the legal proceedings. He also understands that the role of the prosecuting attorney is to seek justice in the case and that the prosecuting attorney will try to seek a conviction. He has a very good understanding of the duties assigned to a jury (i.e., to determine guilt or innocence) and understands that the judge is responsible for assigning a post-conviction sentence, if the defendant is convicted on the charges and, further, that the judge is responsible for assuring that proper protocol is followed in the court room. Further, he is aware of his role as a defendant in the case and the role of a witness. That is, he understands that the witness will be called upon to speak about what they know about the facts of the case and, further, that a witness could provide testimony that could be advantageous to the defendant or harmful to the defendant's case.

[7] Mr. Miller expressed some misgivings about his current representation, that is, his present attorneys. When questioned further, he stated a belief that they might not do a good job for him because they are court-appointed rather than being private attorneys.

Nonetheless, he indicated that he is willing to work with his attorneys and consider their advice throughout the various stages of the legal proceeding, and he went on to state that the attorney he has worked with primarily is "giving a valiant effort – he is really trying." Further, he stated "I am willing to work for myself" thus indicating that he is appropriately motivated to strive toward a favorable outcome in his case. He did, however, express some misgivings about the possible negative effect of press coverage of the alleged offense, but this appeared to be rational and logical as well as being a concern that most any defendant in a serious case might experience.

The defendant has a good understanding of the pleas of Guilty and Not Guilty and the possible outcomes of those particular pleas. He initially required a modicum of education with respect to the plea of Not Guilty by Reason of Severe Mental Disease or Defect, but appeared to grasp the education provided to him in that regard. Further, he was able to demonstrate an adequate understanding of the concept of plea bargaining and should be able to make a rational, informed decision with respect to a plea bargain, if one should be offered to him.

The defendant was able to recount a logical, rational re-telling of the events surrounding the alleged offense. Thus, he should be able to participate adequately with his attorney in the formulation of a defense strategy in terms of giving information that can be utilized in said defensive planning. He also

appears capable of providing rational, logical testimony, if he were called upon to do so.

Mr. Miller acknowledged an understanding of the need to behave appropriately in the courtroom, and he seems capable of doing so. He understands that there can be adverse consequences for inappropriate courtroom behavior and expressed a desire to avoid further complicating his legal situation through inappropriate behavior. Also, there does not appear to be any psychiatric symptomatology that would impede his ability to conform his behaviors to reasonable expectations in the courtroom. Thus, he does not appear to represent any appreciable risk of inappropriate courtroom behavior.

Based on all the foregoing information, it is my opinion that Mr. Miller is adequately suited to proceed in the role of defendant at this time. He does not appear to represent any threat of inappropriate courtroom behavior and seems capable of interacting effectively with his attorneys in the formulation of a defense strategy and seems to understand the proceedings pending against him as well as the adversarial nature of a criminal proceeding.

[8] MENTAL STATE AT TIME OF ALLEGED OFFENSE

Section 13A-3-1(a) of the Alabama Criminal Code states that with regard to a mental state defense, "at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental

disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts."

While it is noted that Mr. Miller has experienced some difficulties in the past and has been hospitalized and treated for depression, there is nothing in the available documentation to suggest that there have ever been any legitimate psychotic features associated with Mr. Miller's hospitalization or his day-to-day functioning. It is my opinion that the defendant, at the time of the alleged offense was not acting as an individual out of touch with reality, responding to command hallucinations or acting in accord with a delusional thought system secondary to severe mental disease or defect. There is nothing in his statements regarding his behaviors during the timeframe in question or in the documentation that would indicate that his ability to differentiate between right and wrong and to understand the essential nature/quality of his behaviors at that time was compromised by Severe Mental Disease or Defect. Statements made in the current interview seem to suggest that he would have been well aware of the wrongfulness of the actions of which he stands accused as well as their essential nature/quality. There is significant indication of goal-directed behaviors on his part at that time, as well. It is conceivable, however, that his judgment at that time was impaired by substance abuse, which he readily admits to engaging in at that time. Nonetheless, I do not believe it was to such a degree as to impair his reality-testing abilities and, most importantly, the voluntary ingestion of

intoxicating substances, in and of itself, does not constitute a threshold condition for a Not Guilty by Reason of Severe Mental Illness or Defect defense.

SUMMARY AND RECOMMENDATIONS

Evan James Miller is a 17-year-old single Caucasian male who was evaluated at THSMF with respect to his competency to stand trial and his mental state at the time of the alleged offense of Capital Murder. Evidently, he first became involved with the criminal justice system at approximately eight or nine years of age and again at 13. He has previously been treated for depression and reports having engaged in prior suicidal gestures, although it is conceivable that some of these were not legitimate suicide attempts but were manipulative in nature.

In the current interview, he did not exhibit psychiatric symptomatology such as hallucinations and delusions and denied that he was experiencing such at the time. Further, it is questionable whether he has experienced such symptomatology previously. Nevertheless, in today's interview, he was able to exhibit appropriate emotional and behavioral control and was able to remain topic-focused throughout the interview. Additionally, no significant cognitive deficits of any kind were noted, and he appeared to be of an intellectual level [9] estimated to lie at least in the low-average range of general intelligence, and this appears to be consistent with prior psychological testing.

Mr. Miller was able to display an adequate understanding of courtroom procedures and the rules and functions of the various individuals involved in a criminal proceeding. In spite of him expressing some misgivings about his current representation because they are appointed attorneys, he appears capable of interacting adequately with an attorney in the formulation of a defense strategy and should be able to offer relevant testimony, if he were called upon to do so. Also, he acknowledged a willingness to consider his attorneys' advice throughout the legal proceedings and, thus, I consider him to be appropriate to proceed in the role of defendant at this time.

Regarding his mental state at the time of the alleged offense, it is my opinion that the alleged acts were not a direct result of any significant mental disease or defect. There is no verifiable history of previous Severe Mental Disease or Defect, apart from a diagnoses of Depressive Disorder. There is also no indication that he has previously suffered from any other Severe Mental Disease or Defect. I believe he would have had the capacity to appreciate the difference between right and wrong during the timeframe surrounding the alleged offense as well as to understand the essential nature/quality of his behaviors. It is conceivable, nonetheless, that his judgment at the time was impaired by substance usage, although as previously stated, the involuntary ingestion of intoxicating substances does not constitute a threshold condition for a Not Guilty by Reason of Severe Mental Disease or Defect defense.

As a mental health professional, I recognize that the determinations of a defendant's competency to stand trial and his/her mental state at the time of the alleged offense are properly matters for the court to decide. Therefore, the clinical opinions provided in this report in regard to these issues are of an advisory nature only. I will be glad to provide the court with any further information, records, or testimony that it may require.

Respectfully submitted,

/s/ Jerry Gragg, Psy.D. 9-29-6

Jerry Gragg, Psy.D. Date
Certified Forensic Examiner

JG/cs 08-00563531.doc

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Revised: 9/28/06

[Circuit Court of Lawrence County, Alabama,
State v. Miller, Case No. CC-2006-68]

(Defendant's Exhibit 4)

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CONFIDENTIAL
PSYCHOLOGICAL EVALUATION

NAME:	Evan James Miller
AGE:	17
DOB:	2 November 1988
CASE NO.:	CC 2006-68
JURISDICTION:	Lawrence County, Alabama
JUDGE:	The Honorable Randel Mullican
ATTORNEY FOR THE DEFENSE:	The Honorable Erekk Jett
DISTRICT ATTORNEY:	The Honorable Jimmy C. Osborn
DATE SEEN:	7 October 2006
REFERRED BY:	Defense Counsel

This is a 17 year old, European American male currently residing in the detention facility in Moulton, Alabama. He was seen for an evaluation on a request

from Mr. Jett who is counsel for the defense. The defendant is charged with capital murder.

DATA SOURCES

All the records I list below were provided to me by defense counsel. They include: (1) the indictment against the defendant, (2) the state fire marshal's office report, (3) a forensic psychological evaluation conducted by Brent Willis, Psy. D. dated 13 January 2004, (4) statements by the defendant (made to law enforcement officials), (5) a psychological evaluation report performed by Jerry Gregg, Psy. D. on 21 August 2006 along with a letter dated 2 October 2006 conveying the report to defense counsel and the other attorneys involved in the case and the Court, (6) consultation with defense counsel and (7) interview and evaluation of the defendant performed on 7 October 2006.

NOTIFICATION

Prior to the initiation of this examination I did inform the defendant as to the purpose of the evaluation and the limitations in regard to confidentiality. He was told that the results of the evaluation would be submitted in the form of a report to the Court, to the defense counsel and to the district attorney. He was also told that the results might be used in court proceedings either through testimony of this examiner or [2] by the written report. He appeared to understand the limited nature of the confidentiality arrangement in this matter and agreed to proceed.

HISTORY

The history was obtained from the defendant. I have no other source currently. He says that he was born in Huntsville, Alabama. He grew up in Decatur. He says that his father was a truck driver. His mother was a waitress. Other documents in the file indicate that the defendant grew up thinking that his stepfather was his father. The indications are that he came from a very disordered environment. At age 10 he was placed in foster care by the Department of Human Resources. He stayed in foster care for two and a half years and then was returned to his biological mother. He indicates, and I do not think that there is any dispute, that he was physically abused and emotionally abused by his stepfather who was reportedly an alcoholic. Apparently his mother is also an alcoholic and addicted to other substances.

He attended school only until about the seventh grade though he has had some educational exposure since then. Prior to his transfer he was resident at the Tennessee Valley Detention Center. He tells me that he did receive some educational interventions while he was there. As far as I can ascertain he is not receiving any such interventions currently.

He does tell me that his mother and stepfather divorced when he was about 10 years of age. Apparently his mother was not able to attend to him at that time. He has had some problems with juvenile authorities for what appear to be relatively minor offenses in the past.

The defendant indicates that after he returned to his mother's residence at about age 12 ½ things began to become very difficult for him. He indicates that he had problems with alcohol and other drugs. He was apparently seen at the mental health center in Decatur. I am not able to obtain those records at this point. He says that he was prescribed Adderall and Zoloft. He indicates to me that he abused the Adderall and the Zoloft. He tells me that abused the Adderall and the Zoloft. He tells me that he ground the Adderall up and snorted it and perhaps did so with the Zoloft as well. He indicates that he was frequently intoxicated.

We have his statements to the police, some of which were apparently made in the presence of his mother who is alleged to have provided counsel for him in that regard. He does indicate to me that he was heavily intoxicated at the time of the alleged offenses. He indicates that he had taken Klonopin, ingested a large amount of whiskey and that he had snorted Adderall and perhaps Zoloft on or around the day of the alleged offense. He indicates an inability to remember much of the detail of those circumstances.

BEHAVIORAL OBSERVATIONS AND MENTAL STATUS

He is a now 17 year old, European American male. Physically he appears to be approximately his stated age. His demeanor suggests some degree of immaturity. He was evaluated in a conference room in his

attorneys office. He was transported to the attorney's office by a sheriff's deputy. He was in some mild distress during the examination because of the presence of an apparent infection of his upper lip. He indicated that he had been told that he had a staphylococcus infection. Apparently he had some problems with that previously.

He says that he has some difficulty sleeping. He says that his appetite is fairly good. That was evident during the examination. We took a break for lunch. He ordered ten tacos and ate most of them. He also ate a large amount of candy and sweets which his attorney went and got for him. He ate as if he was ravenous.

[3] His discourse was a bit rapid and a bit tangential from time to time. He has a tendency to ramble on and also has a tendency to more or less confabulate when he does not know the answers to questions or when things become difficult for him. In essence, he acts like he knows the answers to questions when he does not, and sometimes his verbalizations are a bit nonsensical.

He denies being depressed currently. He says that he has been depressed previously. He says that he has been very nervous and anxious about his current situation, and that seems to be logical.

He describes his general status prior to the alleged offense as being "messed up", and as I have indicated above, he apparently spent a good bit of time being

intoxicated, this despite the fact that he was apparently living with his mother around the time of the alleged offense. I would note that it appears that the alleged offense occurred around 2 o'clock in the morning, so it is pretty apparent that he was not being supervised much, and he does admit that that is the case.

Currently his memory appears to be large intact for recent and remote events. He was able to provide personal and current information. He was able to tell me his age and his date of birth. He correctly named the president and the previous president, the governor and the sheriff. He was oriented in all spheres. He was able to recite the alphabet and count backwards from 20. He was able to perform serial three addition. Logical memory for verbal material was fair. He was able to recall 7 out of 25 elements from a brief story vignette though he did have this tendency to confabulate a bit.

He denies hallucinations. I cannot ascertain any delusional thinking at this point though he does betray some degree of suspiciousness. That quite likely is related to his current situation.

Rapport was adequate for purposes of the examination. This is, of course, a criminal matter. Dissimulation is, therefore, potentially an issue. That issue must be addressed both from the standpoint of his cognitive status and his psychological status. That is to say it is necessary to determine his level of effort in regard to cognitive tasks such as might be related to

his reporting of events or competency to stand trial as pertaining to his cognitive abilities and from the psychological standpoint in order to rule out any malingering or exaggeration of psychopathological symptoms.

In regard to the cognitive issue I administered the 21-Item Memory Test which is a test for dissimulation of cognitive deficits. He obtained a Type I profile. The computer generated printout reads as follows:

> "This person gave a good effort on this test. They attended carefully to the task and performed at a level consistent with well motivated normal controls in well motivated persons with brain injuries. Although such a performance is usually correlated with good effort on other neuropsychological tests this test by itself cannot be taken as proof that the person performed a maximum effort on all tests. The examiner will have to make this decision based upon a careful examination of all clinical and psychometric considerations in determining overall test taking effort."

He is really not exhibiting or claiming any cognitive deficits. His effort seemed to be adequate, otherwise.

The personality assessment contains validity indicators. Response consistency was sound. He does indicate many unusual experiences, deviant symptoms and strange behaviors. He admits to a variety of common adjustment, interpersonal and emotional disorders, more than experienced by most adolescents.

Though the pattern may fall outside boundaries of validity, the possibility must consider that it portrays an adolescent with severe problems rather than intentionally trying to overstate them or misrepresent himself, and that does appear to be the case.

[4] PSYCHOMETRIC FINDINGS – CLINICAL

The defendant was evaluated by means of a psychological assessment including administration of the third edition of the Wechsler Adult Intelligence Scale (WAIS=III) and the adolescent version of the Minnesota Muitiphasic Personality Inventory (MMPI-A). Tests were administered in the usual fashion.

On this administration of the WAIS-III he obtained a full scale IQ score of 96. That score falls within the average range of psychometric intelligence. The verbal IQ score was 98. The performance or visuopractic IQ score was 92. Both of those scores fall within the mildly retarded range.

Subscale scores obtained were as follows:

SUBTEST	SCALED SCORE	PERCENTILE
Vocabulary	11	63
Similarities	9	37
Arithmetic	9	37
Digit Span	9	37
Information	13	84
Comprehension	8	25
Picture Completion	8	25
Digit Symbol – Coding	8	25

Block Design	8	25
Matrix Reasoning	9	37
Picture Arrangement	12	75

This is an unremarkable profile though I would note that his score on the information subscale was rather high. Apparently he shows a lot of interest in environmental facts and circumstances and such.

Personality assessment was undertaken via administration of the MMPI-A. The clinical profile obtained is highly defined and suggests an adolescent who places much value on protecting himself from being deceived, taking advantage of or abandoned. He is suspicious of the motives of others. He feels that he has to be in control. He maintains distance in autonomy from others. He appears to be very demanding in relationships but tends to view obligations and commitments as intolerably restrictive.

He indicates very unusual ideas, perceptions and experiences. The possibility of thought disorder has to be evaluated with reference to the broad range of problems he reports. He is distressing of the motives of others. He interprets events in such a way as to support his expectations of deceit.

There are many depressive symptoms present though they appear secondary to other problems. Anxiety related symptoms occur frequently in many forms. That may be related to his current situation. Some of his coping mechanisms and attitudes seem to be less well developed or mature than those of his peers. He may not show the necessary patience, tolerance of

stress or skill to complete tasks expected of him. He may sometimes find it difficult to recognize and systematically demonstrate his own interests, skills and values. He is actually rather socially introverted.

Antisocial characteristics represent a primary feature. Various histrionic personality traits also play a part in his problems. His sensitivity and suspiciousness suggest a potential for erratic borderline patterns. Trust related issues point to paranoid personality styles or perhaps a paranoid personality disorder.

[5] He explicitly acknowledges excessive use of alcohol and other drugs and many ways that this affects his life.

The model diagnoses suggested by the MMPI-A computer generated printout include delusional disorder, persecutory type; anxiety disorder, nos; alcohol abuse; other or unknown substance abuse. There is a rule out for an eating disorder and there are indications for paranoid, borderline and antisocial personality characteristics.

PSYCHOMETRIC FINDINGS – FORENSIC

Two forensic specific psychometric instruments were administered. I did administer Grisso's Instruments For Assessing and Understanding Appreciation of Miranda Rights. In that regard he demonstrated a fairly good understanding of basic principals in regard to Miranda Warning but had difficulty in

terms of an understanding of the function of such rights in interrogation. In particular he obtained a very low score in regard to his understanding of his right to remain silent. He also had a great deal of difficulty defining or expressing an understanding of the term "right" in general. That is to say that he is not entirely sure what a right is. In regard to his right to silence he indicated his idea that he had an obligation to respond to questions. He was able to understand his right to an attorney but thinks that the right has to do with an attorney being provided before he goes to trial, not necessarily at the time of interrogation.

The defendant was also administered the MacArthur Competency Assessment Tool for Criminal Adjudication. This is a published psychological testing instrument published in 1999. The defendant is provided with a brief story vignette about the commission of an assault. In that context a number of questions are systematically presented which are designed to assess understanding, reasoning and appreciation in the forensic context. The defendant obtained a raw score of 9 for the understanding component. That suggests a mild impairment primarily due to some difficulties he has with procedural issues and understanding of more esoteric forensic issues such as plea bargaining to a lesser charge and the ramifications of a guilty plea in regard to giving up legal rights such as a right to trial. He was able to correctly identify the duties of the judge and the jury. He was able to correctly identify the duties of the prosecuting attorney. Initially

he misidentified the duties of the defense attorney by saying that, "He helps you get a fair trial."

He obtained a score of 14 out of 16 for the reasoning component. That is an acceptable score suggesting minimal or no impairment in that area. He was able to distinguish between two facts provided as to which one would be the most important to present in the case described and was able to do a fairly good job of describing why those facts were important. He did poorly obtaining a score of only 6 out of 12 for the appreciation aspect of the task. That does suggest a clinically significant impairment in that area. He had a tendency to make contradictory comments. He indicated that he thought it was not likely he would be found guilty "because of my age". He was not able to apply an understanding of the concept of pleading guilty to a lesser charge to his circumstances.

IMPLICATIONS FOR COMPETENCY TO STAND TRIAL

This defendant is functioning within the average range of psychometric intelligence. There are no specific cognitive deficits which would interfere with his ability to participate. He is rather concrete in his expression and often acts as if he understands forensically related issues when he does not. Overall, he does appear to understand his current legal situation. He does understand the charges against him. He has some difficulty with facts relevant to his case because of his ability to remember what happened. He does demonstrate at least mild difficulty in understanding

legal issues and procedures in the case and the legal defenses available in his behalf. He does understand some aspects of penalties available. He has minor difficulties in appraising likely outcomes. He has a fair understanding of the roles of the defense counsel, the prosecuting attorney, the judge, the jury and his role. He appears to be able to relate to the [6] defense counsel adequately. He appears to be able to trust and communicate with his counsel. He has some difficulty comprehending instructions and advice and making decisions after receiving such advice as is indicated by the forensic assessment instrument I have reported on above. He appears to be able to refrain from irrational or unmanageable behavior during the trial. He may have difficulty testifying relevantly if cross examined, this largely because of his tendency to confabulate. There are some deficiencies in regard to his ability to protect himself and utilize the legal safeguards available to him as evidenced by his lack of understanding of the right to remain silent.

IMPLICATIONS FOR MENTAL STATUS AT THE TIME OF THE ALLEGED OFFENSE

There appear to be three relevant issues present in regard to his mental status at the time of the alleged offense, the first being that he was 14 years of age. His description of his situation around the time of the alleged offense suggests a lack of support and supervision and a tendency to display deficits in judgment as is common among 14 year olds.

Indications are that the defendant was heavily intoxicated with multiple substances around the time of the alleged offense. As far as I can ascertain that issue is not in dispute. He indicates to me that he had ingested a large amount of alcohol as well as tranquilizing medications and possibly psychostimulant medications at that time. Such intoxication can be expected to have additionally clouded his judgment. It also appears that it has interfered with his ability to recollect pertinent case events.

The third issue pertinent to mental status at the time of the offense relates to his psychological condition. He was diagnosed with an attention deficit hyperactive disorder earlier on. That probably is not particularly relevant. The more relevant issue has to do with the development of a significant personality disturbance. It is the case that youngsters who are physically and emotionally abused and neglected have a much higher rate of diagnosis of personality disturbances than the general population. There are numerous indications in the current psychometrics of this young man to suggest the presence of a significant personality disturbance which we must consider attributable to his rather dire environmental circumstances. Individuals with the sort of personality disturbance he displays, which I would characterize as a borderline personality disorder, have a propensity towards volatility which most likely contributed to his behavior around the time of the alleged offense.

CONCLUSIONS

Examination of the psychometric test data yields the following conclusions and/or inferences.

1. He appears to be functioning within the average range of psychometric intelligence.

2. There are no overt indications for organic brain dysfunction.

3. The defendant displays a personality disturbance with self-injurious behavior, self-defeating behavior, impulsivity and borderline and antisocial characteristics.

4. He has a limited understanding of forensic issues related to competency to confess and competency to stand trial as I have described above.

5. His mental status at the time of alleged offense was likely influenced by intoxication, his immaturity and a developing personality disorder.

6. To some extent because of his inexperience and his young age, his intoxication may not have been entirely voluntary.

[7] 7. Diagnosis:

Axis I: Adjustment Disorder with Anxiety
Attention Deficit Hyperactivity Disorder, Type Unknown, by History

Axis II: Borderline Personality Disorder with Paranoid and Antisocial Features

COMMENT

He does need some additional attention in regard to trial procedures. He has a tendency to act as if he understands things when he does not. To a certain extent this is naivety. There are also some issues related to bravado I think and a reluctance to admit ignorance or weakness. Hence, additional attention would seem to be required.

He is quite impressionable. He is 17 years of age but is rather immature. We would assume that his character continues to emerge. Those issues need to be taken into account in regard to any potential placement.

As a mental health professional I am aware that issues related to competency to stand trial, mental status at the time of the alleged offense and other issues attendant to this case are reserved for the Court. The observations and recommendations I have provided are, therefore, respectfully submitted for the Court's consideration,

John R. Goff, Ph.D.
Clinical Neuropsychologist

JRG/sps
15-Oct-06

IN THE CIRCUIT COURT

OF

LAWRENCE COUNTY, ALABAMA

STATE OF ALABAMA, STATE, VS. EVAN MILLER, DEFENDANT, EVAN MILLER, APPELLANT.	TO: Court of Criminal Appeals of Alabama CASE NO. CC06-68 DATE OF NOTICE OF APPEAL: 1/26/07 APPEAL DATE: 3/23/07

CAPTION

THE ABOVE-ENTITLED CAUSE came on to be heard before the Honorable Philip Reich, on the 16th, 17th, 18th, 19th, and 20th day of October, 2007, at the Lawrence County Courthouse, Moulton, Alabama, when the following proceedings were had and done:

* * *

[1205] THE COURT: Ms. Miller, come around, please. If you will raise your right hand and let me administer an oath to you, please.

(WHEREUPON, THE WITNESS WAS DULY SWORN.)

THE COURT: All right. Have a seat, please. If you will speak in the direction of the mike as it is before you. Thank you.

All right, Mr. Jett.

SUSAN MILLER

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. JETT:

Q. Ms. Miller ask you to state your full name for the Court?

A. Susan Jane Bailey Woodward Miller Pattal.

Q. Ms. Miller, you are Evan's mother; is that correct?

A. Yes, I am.

Q. I need you as I ask you questions loud enough, obviously, so the jury can hear you, but also the court reporter has to take it down. Sometimes people have a habit of nodding yes or no, I need you to verbalize your answers loud and [1206] clear for them to hear?

A. Yes, sir.

Q. What is Evan's date of birth?

A. November 2nd, 1988.

Q. And so how old would that make him now?

A. Seventeen.

Q. Be eighteen next month?

A. Yes, on the 2nd.

Q. When Evan was – in the course of Evan's lifetime, has he ever received any kind of counselling or any kind of mental health treatment, things of that nature?

A. A multitude, yes, for years.

Q. And was he a client of Moulton Mental Health Center here in Lawrence County by the hospital?

A. Yes.

Q. And did he go elsewhere, also?

A. I do believe he attended mental health in Decatur as well and through the Department of Human Resources.

Q. Have y'all always lived in Lawrence County?

A. No.

Q. Evan have any brothers or sisters?

A. Yes.

[1207] Q. When – has Evan – strike that.

From your standpoint growing up – strike that, also.

Evan is he your youngest, middle, oldest?

A. My youngest.

Q. From your experience as a mother with your other two children, pretty average child, all the way through?

A. ADD, but yes.

Q. Okay. Did you have concerns of any mental health issues yourself?

A. Yes, I did.

MR. OSBORN: Ask him not to lead the witness.

THE COURT: Don't lead the witness, please.

(MR. JETT CONTINUED)

Q. Ms. Miller, you indicated just a moment ago the Department of Human Resources, was Evan ever removed from your care?

A. Yes.

Q. When was that?

A. July 18th, 1999.

Q. And why was that?

MR. OSBORN: I don't know what this has [1208] to do with anything. Go ahead.

THE WITNESS: They were placed in foster care because of the child abuse.

(MR. JETT CONTINUED)

Q. Were you abusing Evan?

A. No, it was his father.

Q. And did you have – from your standpoint whatever abuse there might have been, could you see an effect on Evan?

A. Yes, sir.

Q. How long was he in the department's care?

A. At least three years, possibly four.

Q. And during that time the Department of Human Resources had him in a foster family?

A. Yes.

Q. Foster family here locally?

A. Yes.

MR. OSBORN: Again, we'd object to him leading his witness. He can ask a question and she responds, we don't object.

THE COURT: State your question so not as to suggest an answer.

MR. JETT: Yes, sir.

(MR. JETT CONTINUED)

Q. Ever know of an occasion Evan tried to hurt [1209] himself?

A. Yes.

Q. Can you explain to the jury the first instance that you recall?

A. Age five he tried to hang himself in the closet.

Q. Five years old?

A. Yes.

Q. Do you have first-hand knowledge of that?

A. Yes.

Q. Explain to the jury what happened or the circumstances around that?

A. His father had beat him –

MR. OSBORN: Judge, we're going to object. That's irrelevant.

MR. JETT: Your Honor, this goes toward testimony that was illicited just a few moments ago.

MR. OSBORN: I don't think the details are relevant.

THE COURT: I'll sustain as to that. You may restate a question without the details.

(MR. JETT CONTINUED)

Q. Was that the only occasion Evan tried to [1210] harm himself?

A. No.

Q. How many other times?

A. At least five or six.

Q. And were those other five or six as you just mentioned, were those suicide attempts?

A. I believe so or cries for help.

Q. Was Evan ever prescribed medication?

A. Multitudes.

Q. Was that medication, without saying what it was or effects of it, was it along the lines of what he was prescribed by either I take it a psychiatrist or someone in the mental health field?

A. Yes, doctors and psychologists and psychiatrists.

Q. When was he first prescribed any medication in that regard?

A. Approximately age ten.

Q. And up to the time he remained in your home was he on medication?

A. Yes.

Q. Ever know your son to drink alcohol?

A. Yes, he has.

Q. Do you remember the first time you knew he [1211] drank alcohol?

A. I remember one time when I caught him on the fourth of July.

Q. How old would he have been on that occasion?

A. Thirteen.

Q. Ever known your son to use any illegal drugs?

A. Yes.

Q. What drugs would he use? What drugs do you have knowledge that he used?

A. Some medication that I had when I broke my hand.

Q. It was legal medicine, it was prescribed, he was illegally using it?

A. Yes.

Q. What kind of medicine was that if you recall?

A. Lortab, Valium, and he was on Adderall at the time as well so it was a mixture. Also from – this is hearsay, I realize, but –

MR. OSBORN: Judge, we object.

THE WITNESS: I just know what he did take that was mine.

(MR. JETT CONTINUED)

[1212] Q. What was the first time that you recall that he used medication?

A. Probably at age twelve.

Q. And know of him continuing to use any illicit substance other than alcohol up until the time he remained in your home?

A. How can you reward that, explain that.

Q. I asked about alcohol a second ago. I'm not asking about that. You said he started around twelve, was that a one time thing or did you have continuing –

A. He was prescribed medication at approximately age ten, but he did to my knowledge use illicit drugs around twelve.

Q. Okay. Evan, did he – was he enrolled in school as required by law?

A. Yes.

Q. What grade did he complete?

A. To my knowledge through the Tennessee Juvenile Detention Center I do believe he made it to the ninth grade.

Q. You indicated earlier he was in a foster home. Was he with one family for that entire time period?

A. Yes, he was.

[1213] Q. And you also mentioned that he was enrolled in school, what school did he attend?

A. East Lawrence.

Q. From kindergarten all the way through?

A. No, sir.

Q. Did he start school at East Lawrence?

A. No, sir.

Q. Where did he start school?

A. We moved approximately twenty-one times in a period of twenty-two years. So we would have to cover a large area there. I do know that he went to Somerville Elementary.

Q. Without saying, you don't have to say the names, how many schools – how many times do you recall moving with Evan?

A. I would say he has attended at least seven schools, eight schools.

Q. In your own opinion from your own – excuse me not from your opinion, from your first-hand knowledge was Evan in a stable environment?

A. Unfortunately, no.

MR. OSBORN: We object, I don't think that her opinion –

THE COURT: I'll sustain.

(MR. JETT CONTINUED)

[1214] Q. Ever known Evan to have any violent tendencies?

A. Yes, he's had outbreaks.

Q. At the time say of Evan's fourteenth birthday, do you recall that time period?

A. Yes.

MR. OSBORN: Object to him leading the witness.

THE COURT: Go ahead.

(MR. JETT CONTINUED)

Q. Can you describe for the jury and the Court the home environment that Evan lived in?

A. His father left in 1999 so I was a single parent, and I was gone a lot working sixteen hours a day approximately. He was left with a multitude of hours unattended with his brother and sister. So it was a lot of time that he was left alone. He was fourteen at the time, fifteen, but it was hard to keep an eye on him.

MR. JETT: Thank you, Ms. Miller.

Mr. Osborn may have some questions.

THE COURT: Cross.

CROSS-EXAMINATION BY MR. OSBORN:

Q. You been back in the courtroom, haven't you?

[1215] A. Excuse me, been here, yes.

Q. Sometimes?

A. Yes.

MR. OSBORN: Ms. Miller, I don't have any questions for you.

THE WITNESS: Thank you.

REDIRECT EXAMINATION BY MR. JETT:

Q. Ms. Miller, Mr. Osborn just asked you have you been here, how much have you been here this week?

A. I've been here everyday. I haven't been here early in the morning and sometimes we've had to leave in the afternoon.

Q. Your son is on trial for capital murder, you haven't been here every moment of this trial, have you?

A. This is correct.

MR. JETT: Thank you, ma'am.

THE COURT: Any other questions?

MR. OSBORN: No, sir.

The court: You may step down.

* * *

[1396] (WHEREUPON, THE JURY WAS DISMISSED, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD AND DONE.)

THE COURT: Please be seated.

Defendant come forward, please.

(WHEREUPON, THE DEFENDANT APPROACHED THE BENCH, AFTER WHICH THE FOLLOWING PROCEEDINGS WERE HAD AND DONE.)

THE COURT: Mr. Miller, the jury having [1397] returned the verdict that they have finding you guilty of count two of the indictment being capital murder in the course of committing an arson in the first degree, I will enter judgment accordingly. And as to this, there is the aspect of the capital charge which carries with it under the law and force and effect by reason of your age only the punishment of life without the benefit of parole. Any request for any setting as to other matters that may be presented or considered?

MR. TERRY: We anticipate we'll be filing some written motions in regard to the verdict.

MR. OSBORN: Judge, we have a claim for restitution and the victim's family wants to be heard before sentence is pronounced at whatever point you pronounce sentence.

THE COURT: Let me see the attorneys

(WHEREUPON, A BENCH CONFERENCE WAS HAD, DURING WHICH THE FOLLOWING PROCEEDINGS WERE HAD AND DONE.)

THE COURT: I guess the question if there is a request that we set up on [1398] another date on another time for any type of proceeding or hearing for the family to be heard?

MR. OSBORN: No, sir.

THE COURT: Anything from the defendant? I think under the aspect of this with the judgment, the finding having been made by the jury and the verdict returned as to finding him guilty of a capital count, that there is only one matter to be presented and that would be life without the benefit of parole, any restitution or other matters that may be entered accordingly, also. If there are motions you have to file as to this, that could follow.

All right. Having received the verdict as noted from the jury in this case, Mr. Miller, I will enter judgment accordingly consistent with the verdict as returned finding you guilty of capital murder as charged in count two of the indictment. Ask you if you have anything to say or know any reason why I should not pronounce sentence against you accordingly [1399] at this time, do you have anything to say?

THE DEFENDANT: Yeah. I'd like to say I'm sorry for all this, for causing everyone a lot of pain.

THE COURT: Okay. Anything further?

MR. TERRY: No, sir, Your Honor.

THE COURT: Based upon the law as noted, I would sentence you to life in prison without the benefit of parole. The Court has no other option or discretion in that. Further, would enter an order directing that you pay restitution that may be claimed.

MR. OSBORN: Judge, the claim for restitution is three thousand seven hundred thirty dollars and twenty-four cents to the victim's family, Ms. Candy Cheatham. And restitution in the Alabama Crime Victim's Compensation Commission in the amount of five thousand eighty-nine dollars and thirty-three cents.

THE COURT: I would enter also a further order, Mr. Miller, directing that you pay as restitution to Ms. Candy Cheatham on behalf of the family three [1400] thousand seven hundred thirty dollars twenty-four cents. Further order that you pay to the Crime Victim's Compensation Commission five thousand eight-nine dollars and thirty-three cents.

The co-defendant has also been ordered to pay the same amount, but as the law says that if nothing else is paid by the co-defendant, then that amount is to be paid by you. So we have two individuals ordered to pay that. There won't be a double recovery, but each of you have that cost if no one else paid anything.

Further order the cost to be entered, fifty dollars to the Crime Victim's Compensation Commission.

Anything further?

MR. OSBORN: Judge, if I could check with Ms. Cheatham to see if she wants to make a statement.

THE COURT: Anything she wanted to say?

MR. OSBORN: Judge, Ms. Cheatham would like to address the Court briefly.

MS. CHEATHAM: Okay, I know that what I have to say doesn't affect a sentence, but [1401] I do want the Court to know the impact that what Evan Miller has done to me and my family has caused, the pain.

You say you're sorry, you have no idea what kind of pain we have had to go through. I have had every emotion, I'm sure I speak for my family, from feeling physically sick, to being sad, to crying, things coming up and just totally ruining our lives. Don't know if you know what it's like to plan a funeral and have to pick out a headstone that restitution would go to this headstone right here (indicating), my father's headstone that cost money. It is very difficult to plan your father's funeral. It was difficult to get this news. It was difficult to hear that it was murder. I have had nightmares. I know some of my other family members have, too.

I'm pregnant. I'm going to have a baby. My brother, his wife is pregnant, too and they are going to have a baby, so my dad would have grandkids and they are not going to know their grandfather. I'm [1402] going to have to say, I'm sorry, your granddaddy was beat and hit and left begging for his life in a fire. He was murdered by Evan Miller and Colby Smith. That's what I'm going to have to tell my grandchild. That's what my brother is going to have to tell his grandchild. If my sister ever gets married, she's not going to have her daddy to walk her down the aisle. In my brother's wedding we had to put up a photo because my dad was not there. That's the kind of effect and pain that it has caused. And you know, I'm glad the jury came back with a guilty verdict today and the sentence will be life without parole because I think that's what you deserve.

I do hope when you are in prison, I do hope you find God and find Jesus and he can forgive you because right now, I can't forgive you and I don't think my family can either.

But it has been a nightmare. It has been a roller coaster to have to go through. And it's not over for me. Even [1403] though this is over today, we will have to live with this for the rest of our life. We will have to live with when Thanksgiving comes up and Christmas comes up and all the holidays come up and his birthday comes up, we have to relive that he is not here, this is where he is (indicating). He is not with us anymore.

And the only thing that I did manage to get from the fire was pictures of my daddy when he was little. These black and white pictures luckily they were in a manilla envelope and they were not damaged. So I have his picture.

You know, he was a person and he mattered to us. Here he is on a bicycle, here he is with his brother, here is his grandfather and here he is again. This is what I have. This is all I have left from that fire.

I just think – I think that is – this is the sentence – since it is the maximum sentence that you deserve.

THE COURT: All right. Thank you.

MR. OSBORN: Thank you for letting her [1404] speak.

THE COURT: In addition to those matters with a capital case as to rights of a appeal, I would say that you have the right to appeal as is otherwise given within forty-two days of date of sentence which is today. If you are indigent, a free transcript, record will be provided to you at no cost. You understand those rights?

THE DEFENDANT: I don't understand nothing.

THE COURT: Okay. Well, it's given by law as a matter of record. You have your attorneys that can further discuss that with you. There will be a written order that will follow that will state the finding of the jury, the judgment accepted, entered,

the sentence imposed, the rights advised. The restitution ordered and cost.

That being entered and decided, we stand adjourned. Remand you to the custody of the sheriff.

(WHEREUPON, NO FURTHER PROCEEDINGS WERE HAD IN [1405] THIS CAUSE ON THIS DAY.)

STATE OF ALABAMA,	)	IN THE CIRCUIT
	)	COURT FOR
Plaintiff,	)	LAWRENCE COUNTY,
vs.	)	ALABAMA
	)	
EVAN MILLER,	)	
	)	
Defendant.	)	CASE NO: CC 2006-68

JUDGMENT AND SENTENCING ORDER

(Filed Nov. 1, 2006)

This cause appearing on the regularly scheduled Criminal Jury Docket beginning October 16, 2006, and the State of Alabama appearing through its District Attorney, Jim Osborn, and Assistant District Attorney, Robert K Lang, and announcing ready and the Defendant and his counsel, Mr. Michael Terry and Mr. Errek Jett, appearing and announcing ready, the case is set for trial. The case is called for trial, a jury is selected and evidence is presented in the case. The attorneys for the State and the Defendant make their closing arguments to the jury and the Court proceeds to instruct the jury on the law applicable to the case.

The jury, on October 20, 2006, returned the following verdict in open Court:

> "We, the Jury, find the Defendant, EVAN MILLER, guilty of Capital Murder during the course of Arson I."
>
> Dated the 20th day of October, 2006.
>
> (Signed) Cheryl L. Sawyer, Foreperson"

Based on the foregoing verdict returned by the jury, the Court will enter Judgment accordingly.

The Defendant and his counsel are called before the bench and after reading the verdict, the Court **ADJUDGES EVAN MILLER GUILTY** of the offense of Capital Murder [2] during the course of Arson I.

The Court finds that a recent Supreme Court ruling has held that execution of individuals under the age of 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments, and as such, as the defendant was 14 years of age at the time of the capital crime committed in this cause, the only possible punishment that the defendant may be subjected to is life without the possibility of parole. *Roper vs Simmons*, 543 U. S. 551 (2005).

It is therefore **ORDERED** by the Court that, in accordance with the Supreme Court ruling noted hereinabove, the defendant is sentenced to the custody of the Commissioner of the Department of Corrections for **LIFE WITHOUT THE POSSIBILITY OF PAROLE**, Ordered to pay $50.00 Crime Victims Compensation Fund Assessment, restitution of $3,730.24 payable to Candy Cheatham, restitution of $5,089.33 payable to the Alabama Crime Victims Compensation Commission, and further Ordered to pay court costs.

Following the imposition of sentence by the Court, the Court informed the Defendant of his right to appeal and that if he is indigent, the Court will appoint counsel to represent him on appeal and will have a

certified copy of the record and the reporter's transcript provided without cost to him if he appeals.

It is FURTHER ORDERED that copies of this Order shall be circulated to the Probation Department, the Defendant and his attorney, to the District Attorney, and the Sheriff of Lawrence County, Alabama through the United States Mail, postage prepaid.

DONE AND ORDERED, this 20th day of October, 2006.

/s/ Philip Reich
Philip Reich, Circuit Judge

IN THE CIRCUIT COURT OF
LAWRENCE COUNTY, ALABAMA

EVAN MILLER,	*	
Defendant,	*	
vs.	*	Case No.
	*	CC-2006-000068-00
STATE OF ALABAMA,	*	
Respondent.	*	

MOTION FOR A NEW TRIAL

(Filed Nov. 20, 2006)

Evan Miller respectfully moves this Court for a new trial and relief from his unconstitutional sentence, pursuant to Rule 24.1 of the Alabama Rules of Criminal Procedure, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law. Mr. Miller states the following in support of his motion:

I. MR. MILLER IS ENTITLED TO RELIEF BASED ON THE OBJECTIONS AND LEGAL CHALLENGES MADE PRIOR TO AND DURING HIS TRIAL, WHICH RESULTED IN HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE.

1. Counsel reasserts all objections, motions and legal challenges made prior to and during Mr. Miller's trial, and urges this Court to reconsider its rulings on those objections, motions and legal challenges.

Counsel asks this Court to grant Mr. Miller a new trial, under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law.

[2] **II. SENTENCING A FOURTEEN-YEAR-OLD DEFENDANT TO DIE IN PRISON VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.**

2. Evan Miller is one of only two fourteen-year-old children to be sentenced to life without the possibility of parole in the State of Alabama. Children aged fourteen and younger are a distinct group of juvenile offenders for whom a sentence of life without parole is unconstitutional. Evan's current sentence is unusual, excessive, and in violation of the requirements of the Eighth and Fourteenth Amendments to the United States Constitution.

3. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The provision is applicable to the States through the Fourteenth Amendment. *Furman v. Georgia,* 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California,* 370 U.S. 660, 666-67 (1962); *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463 (1947) (plurality opinion).

4. The United States Supreme Court recently reaffirmed the necessity of referring to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)).

5. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court declared that the execution of juveniles who were under the age of eighteen at the time of the crime violates [3] the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 568. In addition to finding that a national consensus had developed against punishing children with death, the Court held that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572-73. On this basis, the Court concluded:

> When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

Id. at 573-74. The Court relied upon social science data to conclude that three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

6. First, the Court in *Roper* found that juveniles tend to suffer from a lack of maturity and an "underdeveloped sense of responsibility," which often result in "impetuous and ill-considered actions and decisions." *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Thus, "adolescents are overrepresented . . . in virtually every category of reckless behavior." *Id.* A fourteen-year-old's lack of responsibility and immaturity is consonant with recent research indicating that the human brain continues to develop into an individual's early twenties.[1]

[4] 7. Second, young children "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569. They "have less control . . . over their own environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* (internal quotation and citation omitted). As the Supreme Court recognized in

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[1] *See* Brown, SA., Taper, SF., Gransholm, E., & Delis, DC., *Neurocognitive Functioning of Adolescents: Effects of Protracted Alcohol Abuse*, Alcohol. Clin. Exp. Res. 2000 Feb; 24(2), 164-71; *see also* Shannon Brownlee, *Inside the Teen Brain*, U.S. News and World Report (Aug. 9, 1999) (stating that "one of the last parts [of the teenage brain] to mature is in charge of making sound judgments and calming unruly emotions."). Recognizing, that juveniles engage in reckless behavior, the State of Alabama has chosen to make the age of majority in the State nineteen, *see* Ala. Code § 26-1-1 (1975), the minimum age for jury service nineteen, *see* Ala. Code § 12-16-60(a)(1) (1975), and prohibits the purchase of alcohol to any individual under the age of twenty-one. *See* Ala. Code § 28-1-5 (1975).

Eddings v. Oklahoma, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 455 U.S. 104, 115 (1982).

8. Finally, the character of a child is not as well formed as that of an adult. "The personality traits of juveniles are more transitory, less fixed." *Roper,* 543 U.S. at 570. As a consequence of these limitations, the Court in *Roper* concluded that, it would be "misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

9. The Court's analysis in *Roper* has the greatest force and application to the youngest offenders, which makes the new constitutional framework for sentencing juveniles most compelling in this case. Evan was sentenced to life without parole when he was fourteen years old, which is the youngest age a child can be sentenced as an adult in [5] Alabama. Ala. Code § 12-15-34(a) (1975). Evan received the harshest sentence possible under Alabama law, outside of a death sentence, with no consideration of his age or the constitutionally significant considerations relevant to juvenile sentencing after *Roper.*

10. In determining that a imprisonment until death is a disproportionate sentence for juvenile offenders, the *Roper* Court also reaffirmed its practice of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of

'cruel and unusual punishments.'" 543 U.S. at 575. The Court specifically referred to the Convention on the Rights of the Child's prohibition against imposing the death penalty on juveniles and noted that "[p]arallel prohibitions are contained in other significant international covenants." *Id.* at 576 (citing ICCPR, Art, 6(5), 999 U.N.T.S., at 175 (prohibiting capital punishment for anyone under eighteen at the time of offense) (signed and ratified by the United States subject to a reservation regarding Article 6(5), as noted, *supra,* at 1194); American Convention on Human Rights: Pact of San Jose, Costa Rica, Art. 4(5), Nov. 22, 1969, 1144 U.N.T.S. 146 (entered into force July 19, 1978) (same); African Charter on the Rights and Welfare of the Child, Art. 5(3), OAU Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999) (same)).

11. The United States is one of only a few countries that permit fourteen-year-olds to be sentenced to life in prison without the possibility of parole. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia, forbids this practice, United Nations Convention on the Rights of the Child, Art. [6] 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-1470 (entered into force Sept. 2, 1990), and at least 132 countries have rejected the sentence altogether. Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005),

http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

12. A long line of United States Supreme Court cases establishes that an inquiry into evolving standards of decency is required under Eighth Amendment jurisprudence. See, e.g., *Hudson v. Macmillan,* 503 U.S. 1, 7 (1992) (holding that Eighth Amendment prohibition on cruel and unusual punishment "draws its meaning from the evolving standards of decency that mark the progress of a maturing society") (citing *Rhodes v. Chapman,* 452 U.S. 337, 346 (1981) (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion))); *Estelle v. Gamble,* 429 U.S. 97, 102 (1976) ("we have held repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society'") (quoting *Trop v. Dulles,* 356 U.S. 86, 101 (1958) (plurality opinion)).

13. The Supreme Court's decision in *Roper* is a change in the law that recognizes that sentencing standards regarding juveniles have evolved in such a manner that life without parole for a defendant who was fourteen years old at the time of the offense now violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

14. Moreover, very few states have expressly authorized life without parole for crimes committed by fourteen-year-olds. *See Thompson v. Oklahoma,* 487 U.S. 815 (1988). [7] According to the Supreme Court, "the clearest and most reliable objective evidence of

the contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

15. Evan Miller was fourteen years old when he was sentenced to die in prison. Evolving standards of decency prohibit sentencing fourteen-year-olds to life in prison without the possibility of parole. Accordingly, Evan's sentence is unconstitutional and should be vacated.

III. THE MANDATORY NATURE OF THE SENTENCE IN THIS CASE VIOLATED EVAN'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

16. This Court could not consider Evan's age, history of abuse and suicide attempts, chaotic family life, or drug and alcohol problems when sentencing him to imprisonment until death. This Court applied a mandatory sentence that unconstitutionally failed to consider and weigh dramatic mitigating evidence. This violates the Eighth and Fourteenth Amendments.

17. The Alabama Legislature has not passed a statute expressly providing that fourteen-year-olds convicted of capital murder should be subjected to a mandatory sentence of life without possibility of parole. This violates the Due Process Clause of the Fourteenth Amendment because it is not the result of a legislative determination that life without parole should be the only available punishment in such cases.

It also violates due process because a mandatory life without parole sentence requires the sentencing judge to impose the [8] penultimate penalty without considering or giving effect to mitigating circumstances. The Legislature has made no determination to remove sentencing discretion from the judge in capital cases involving fourteen-year-old offenders, nor does the Constitution permit the mandatory sentencing of fourteen-year-old offenders to life without parole to stand.

18. The United States Supreme Court has long held that the ultimate punishment – the death penalty – cannot be mandatory, because the Eighth and Fourteenth Amendments require the sentencer to consider all mitigating factors related to the offender and the crime which suggest that the harshest sentence is not appropriate. *Summer v. Shuman,* 483 U.S. 66 (1987) (holding categorically that mandatory death sentences are unconstitutional); *Roberts v. Louisiana,* 431 U.S. 633 (1977) (holding Louisiana statute providing for mandatory sentence of death for crime of first-degree murder of police officer violated the Eighth and Fourteenth Amendments); *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976) (holding that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *see also Hitchcock v. Dugger,* 481 U.S. 393, 394 (1987)

(unanimously holding that the "sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (expressly stating that the sentencer must be given *all* mitigating evidence, defined as any evidence that "might serve 'as a basis for a sentence less than death.'"); *Eddings v.* [9] *Oklahoma*, 455 U.S. 104 (1982) (striking state statute that precluded sentencer from considering certain relevant mitigating *evidence*, in support of mitigating factors); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Bowe v. The Queen*, [2006] UKPC 10 (appeal taken from The Bahamas) (striking down mandatory death sentence).

19. Imposing a life without parole sentence on a fourteen-year-old child without permitting the sentencer to consider whether or not the penultimate sentence is proportionate to the crime and the child likewise offends the Eighth and Fourteenth Amendments. First, life without parole is a different and harsher punishment when inflicted on a fourteen-year-old, which renders the sentence presumptively disproportionate and requires individualized consideration to justify its imposition. As noted by the Kentucky Supreme Court, "life without parole for a juvenile, like death, is a sentence different in quality

and character from a sentence to a term of years subject to parole." *Hampton v. Kentucky,* 666 S.W.2d 737, 741 (Ky. 1984); *see also Workman v. Kentucky,* 429 S.W.2d 374, 378 (Ky. 1968) (reversing life without parole sentences for two fourteen-year-olds convicted of forcible rape). In striking down on proportionality grounds a life without parole sentence imposed on a thirteen-year-old, the Nevada Supreme Court characterized life without parole as a "denial of hope; it means that good behavior and character improvement are immaterial; it [10] means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days." *Naovarath v. Nevada,* 779 P.2d 944, 948-49 (Nev. 1989). In addition, young offenders run a far greater risk of physical and sexual assault by older, more mature prisoners, and will suffer this fate for years to come when sentenced to life without parole.

20. More critically, *Roper* created a different class of defendants when it prescribed that juveniles are constitutionally entitled to different consideration based on their distinct competency, culpability, and capacity for rehabilitation: "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper,* 543 U.S. at 572-73; *see also Naovarath,* 779 P.2d at 946-47 ("When a child reaches twelve or thirteen, it may not be universally agreed that a life sentence without parole should never be imposed, but surely all agree that such a severe and hopeless

sentence should be imposed on prepubescent children, if at all, only in the most exceptional of circumstances. Children are and should be judged by different standards from those imposed upon mature adults.").

21. Individualized consideration at sentencing in a capital case involving a fourteen-year-old defendant is constitutionally required because a fourteen-year-old's immaturity, vulnerability, and lack of neurological and personality development undermines the reliability of the criminal process at each stage. Consequently, before the harshest [11] punishment is imposed, a sentencer must be permitted to consider and give effect to mitigating evidence.

22. In Evan's case, this Court had no discretion to consider whether life without parole is proportionate in light of the wealth of mitigating evidence, discussed below, including that this offense was predicated by a lifetime of neglect, abuse and chaos; that Evan was particularly susceptible to the negative influences of his parents and older co-defendant; that Evan has attempted suicide several times in his short life; and that Evan's problem with impulse control, which is typical of early adolescence, was exacerbated by those forces and by his abuse of drugs and alcohol.

23. This Court's imposition of a mandatory life without parole sentence was arbitrary and disproportionate and violated Evan's rights to an individualized sentencing determination, to due process, and to be free from cruel and unusual punishment as

protected by the Eighth and Fourteenth Amendments to the United States Constitution.

IV. EVEN IF THE CONSTITUTION DOES NOT CATEGORICALLY PROHIBIT A SENTENCE OF LIFE WITHOUT PAROLE FOR FOURTEEN-YEAR-OLDS, THE SENTENCE IN THIS CASE IS UNCONSTITUTIONAL BECAUSE EVAN WAS A NEGLECTED AND ABUSED FOURTEEN YEAR-OLD WITH A HISTORY OF SUICIDE ATTEMPTS AND DRUG AND ALCOHOL ABUSE.

24. Evan Miller's sentence of life imprisonment without the possibility of parole is unconstitutional even if the Eight and Fourteenth Amendments do not proscribe that sentence for all fourteen-year-old defendants because the trauma, physical abuse, mental [12] illness, and drug and alcohol abuse he experienced rendered his culpability insufficient to merit the harshest available punishment. As a consequence of his limitations in reasoning and judgment, as the United States Supreme Court recently articulated in *Roper,* his conviction and sentence of life imprisonment without the possibility of parole are unconstitutional.

25. Evan witnessed and experienced extremely violent behavior at the time when he was "most susceptible to influence and to psychological damage." *Eddings,* 455 U.S. at 115. His father's physical abuse of Evan was so severe that Evan tried to hang himself at the age of five. He subsequently tried to harm

himself at least five or six more times. When Evan was only seven, the Department of Human Resources had to remove him from his family's home as a consequence of his father's extreme physical abuse.

26. After being removed from his family's home, Evan spent three years in foster care. He was then returned to his chaotic family life. When Evan was eleven, his father abandoned him and his family. Evan was then neglected by his mother, who abused drugs and was gone sixteen hours a day.

27. At fourteen, Evan suffered from a lack of maturity and an "underdeveloped sense of responsibility," which often resulted in "impetuous and ill-considered actions and decisions." *Roper,* 543 U.S. at 569. Psychologist John Goff described Evan as "extremely impulsive."

28. Evan was particularly vulnerable to negative influences and peer pressure, including that applied by co-defendant Colby Smith. *See Roper,* 543 U.S. at 569. Evan began abusing drugs, [13] including prescription medications, crystal methamphetamine, and marijuana, at the age of twelve, and began drinking heavily at age thirteen. Evan's drug and alcohol abuse further impaired his judgment.

29. Because the character of a child is not as well formed as that of an adult, the Court in *Roper* concluded that it would be "misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper,* 543 U.S. at 570.

Moreover, research has shown that juveniles subjected to trauma, abuse, and neglect suffer from cognitive underdevelopment, immaturity, lack of responsibility, impulsiveness, and susceptibility to outside influences greater even than those suffered by normal teenagers. Nancy Kaser-Boyd, Ph.D., *Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance, Desktop Reference Manual* (May 1994). In Evan's case, the presence of extreme physical abuse, a chaotic family life requiring removal from the home, multiple suicide attempts at a very young age, and drug and alcohol abuse exacerbates the problems of adolescence addressed in *Roper* and requires a distinct constitutional inquiry. *See, e.g., Atkins v. Virginia*, 536 U.S. 304 (2002).

V. LIFE IMPRISONMENT WITHOUT PAROLE IS ALMOST NEVER IMPOSED ON FOURTEEN-YEAR-OLD CHILDREN BECAUSE IT OFFENDS EVOLVING STANDARDS OF DECENCY AND SHOULD BE BARRED BY THE EIGHTH AMENDMENT.

30. Evan Miller is only the second fourteen-year-old known to be sentenced to life imprisonment without possibility of parole in the State of Alabama. In the great majority of [14] American states and jurisdictions, there are no children fourteen or younger who are known to be sentenced to life imprisonment without parole.

31. In interpreting the Eighth Amendment's prohibition against cruel and unusual punishments,

courts must refer to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality op.)). "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is "unusual" depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance. *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988).

32. It is well-established that courts should look to the frequency with which a punishment is imposed in determining whether it is unusual for Eighth Amendment purposes. In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" *Godfrey v. Georgia*, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (citing *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring)); *see also id.* at 439 n.9 (noting that, in *Furman*, Justices Stewart and White "concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals [15] of punishment.").[2] In *Coker v. Georgia*, 433

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[2] *See also Furman*, 408 U.S. at 249 (rarity of a sentence leads to an inference of its arbitrary imposition) (Douglas, J., concurring); *id.* at 274-77 (Eighth Amendment prevents arbitrary

(Continued on following page)

U.S. 584, 596-97 (1977), the Court looked to the rarity of death sentences for rape of an adult woman in concluding that the death penalty is an unconstitutionally cruel and unusual punishment for that crime. Likewise, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality of the Court determined that contemporary standards of decency did not permit the execution of offenders under the age of sixteen at the time of the crime, noting that the death penalty was imposed on offenders under sixteen with exceeding rarity. *Id.* at 832-33. When *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided, only a minority of states permitted the execution of persons with mental retardation, "and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" *Roper*, 543 U.S. at 563 (citations omitted); *see also id.* at 564 ("*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry*, only five States

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death sentences; rarity of death sentences results in an inference of arbitrariness) (Brennan, J., concurring); *id.* at 299-300 (Brennan, J., concurring); *id.* at 312 (rarity of imposition indicates arbitrariness; "A penalty with such negligible returns to the State would be patently excessive" and therefore violate the Eighth Amendment) (White, J., concurring); *id.* at 314 (White, J., concurring); *see also Enmund v. Florida*, 458 U.S. 782, 794-96 (1982) (few juries sentence defendants to death who neither killed nor intended to kill).

had executed offenders known to have an IQ under 70.").

33. The Court in *Roper* found "sufficient evidence that today our society views [16] juveniles . . . as 'categorically less culpable than the average criminal'" so as to render the juvenile death penalty unconstitutionally cruel and unusual based in part on the infrequency of its use even in states where it remained on the books. *Id.* at 568; *see also id.* at 564 (noting that even in twenty states without formal prohibition on executing juveniles, "the practice is infrequent.").

34. The practice of sentencing fourteen-year-olds to life imprisonment without parole is so infrequent as to render it an arbitrary and "unusual" punishment prohibited by the Eighth Amendment. Evan is only the second fourteen-year-old child known to be sentenced to life imprisonment without parole in the State of Alabama.[3] Extensive research by undersigned counsel has uncovered children fourteen years old or younger sentenced to life without parole in only eighteen other states.[4] In the great

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[3] Neither Alabama's Department of Corrections nor undersigned counsel's extensive research, *see* note 4, *infra*, could identify more than two children Evan's age who have been sentenced to life without parole in Alabama.

[4] Arizona, Arkansas, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Mississippi, Missouri, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin. Undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published

(Continued on following page)

majority of states, no child Evan's age has been subjected to life imprisonment without possibility of parole.

35. The nationwide and statewide statistics show that young children are almost never sentenced to die in prison because such a sentence offends evolving standards of decency. Undersigned counsel has been able to identify no more than a few dozen cases [17] nationwide in which a sentence of life without parole has been imposed on someone as young as fourteen; those cases represent just a tiny fraction of cases in which people fourteen or under have been arrested for homicide.[5] In Alabama, 312 juveniles were arrested for homicide between 1995 and 2004. Alabama Criminal Justice Info. Ctr., Statistical Analysis Ctr., Crime in Alabama, 1995-2004, *available at* http://www.acjic.alabama.gov/SAC/. However, only two fourteen year olds, including Evan Miller, have been sentenced to life without parole in that time period.

36. The rarity with which life imprisonment without parole is imposed on fourteen-year-old children

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decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners.

[5] For example, in just the ten-year period between 1995 and 2004, 1343 children aged fourteen or under were arrested for murder or non-negligent manslaughter nationwide. U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States 290 (2004), *available at* http://www.fbi.gov/ucr/ucr.htm; *id.* at 280 (2003); *id.* at 244 (2002); *id.* at 244 (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996); *id.* at 218 (1995).

reflects community norms and values that have evolved and reject life without parole sentencing for young children Evan's age. Accordingly, Evan's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments and should be vacated.

CONCLUSION

37. For the above stated reasons, Mr. Miller respectfully asks this Honorable Court to vacate his conviction and order a new trial, or, in the alternative, to vacate his sentence of life without the possibility of parole, and impose a sentence of life with the possibility of [18] parole.

Respectfully submitted this 20th day of November, 2006.

/s/ Bryan A. Stevenson
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[Certificate Of Service Omitted In Printing]

DENIED

(Filed Jan. 23, 2007)

It is Further Ordered that the Clerk of the Court circulate copies of this ruling to parties by U.S. Mail, postage prepaid. _____
Dated this 12th day of January, 2007

/s/ Philip Reich
Philip Reich, Circuit Judge

IN THE CIRCUIT COURT
OF LAWRENCE COUNTY

STATE OF ALABAMA,	)	
Plaintiff,	)	
	)	
v.	)	CC-2006-68
	)	
EVAN JAMES MILLER,	)	
Defendant.	)	

RESPONSE TO MILLER'S
MOTION FOR A NEW TRIAL

(Filed Dec. 20, 2006)

On behalf of the State of Alabama, the Attorney General denies Miller's claim that his mandatory sentence of life imprisonment without the possibility of parole is unconstitutional under the federal or state prohibition on cruel and unusual punishment. Accordingly, the State requests this Court deny Miller's motion for a new trial and/or new sentence. In support of its request, the State offers the following:

1. Miller was convicted of capital murder for savagely battering Cole Cannon's body with a baseball bat and then murdering Mr. Cannon by setting his home on fire and letting him choke to death. To assert that the State does not have the right to keep Miller, a convicted capital murderer, off the street for the rest of his life is absurd – even if he was a juvenile when he committed the crime. The only cruel and unusual sentence in this case would be a sentence

that one day allows Miller to be set free while Mr. Cannon remains deceased.

2. Nothing in the federal or state Constitution bar the State from permanently incarcerating convicted murderers. Likewise, murderers do not have the constitutional right to be free. Simply put, whether to sentence a juvenile murderer to life without parole is a policy question for the Alabama legislature, not a constitutional question for this Court or any other court.

3. Miller's assertion that the United States Supreme Court "determine[ed] that imprisonment until death is a disproportionate sentence for juveniles" in *Roper v. Simmons,* 543 U.S. 551 (2005) is wrong. (Miller's motion at 5.) The *Roper* Court never made such a determination. In fact, the argument that the *Roper* Court held, or even implied that, a sentence of life without parole ("LWOP") for juveniles is unconstitutional ignores the holding in *Roper.*

4. The *Roper* Court agreed with the Missouri Supreme Court that the death penalty for any person who was less than 18 years of age at the time he committed murder was unconstitutional. But, in doing so, the Supreme Court affirmed the Missouri Supreme Court's holding that the juvenile murderer be mandatorily sentenced to life without parole under Missouri law. *See id.* at 579. And, when faced with the State's argument that ruling the juvenile death penalty was unconstitutional would negate

the deterrence effect of the death penalty for juveniles, the Court responded:

> To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

Id. at 572. If the *Roper* Court determined that a LWOP sentence was unconstitutional as Miller claims, it would not have embraced the LWOP sentence given by the Missouri high court; nor would it have cited the LWOP sentence as a reason why losing the juvenile death penalty would not prejudice the States. Accordingly, based on the Court's rationale and ultimate holding, the *Roper* Court embraced LWOP sentences for juveniles instead of determining "that imprisonment until death is a disproportionate sentence for juveniles" as Miller claims.

5. The solution to the question presented is simple: Miller's sentence is not "cruel and unusual," as prohibited by the Eighth Amendment. U.S. Constit. Amend. VIII. Sending Miller to prison for the rest of his life is not cruel based on what he did to Mr. Cannon. As shown below, sending Miller to prison for the rest of his life is not unusual when compared to the penalties other capital murderers receive. Because Miller's sentence plainly fails to meet either

part of the Eighth Amendment's sentencing prohibition, no further argument should be necessary.[1]

6. Regardless, Miller cannot show that his sentence is unconstitutional under the current Eighth Amendment framework set forth by the United States Supreme Court. To show that a sentence violates the Eight Amendment, the defendant has the burden of showing that his sentence is grossly disproportionate to the crime he committed. *See Roper*, 543 U.S. at 559 ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense.")

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[1] The State objects to the use of "evolving standards of decency," international law, and/or proportionality tests as the guides to determining whether Miller's sentence is "cruel and unusual" under state and federal law. The plain text of the amendments and their original meanings should be the proper guides, and the State reserves the right to raise this argument on appeal. *See, e.g., Roper*, 543 U.S. at 609 (Scalia, J. dissenting) ("The Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment: whether it is one of the "modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted"; *Harmelin*, 501 U.S. at 965 ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.") Yet, because the Supreme Court currently embraces proportionality and "evolving standards of decency" as the guides for Eighth Amendment jurisprudence, the State addresses Miller's claims under these tests as defined by the Court in *Roper* and its predecessors.

7. Under current Supreme Court caselaw, a defendant can show his sentence is unconstitutionally disproportionate in two ways. First, he can show that a national consensus on the "evolving standards of decency" soundly reject his sentence. *See id.* at 560-61 (citing *Trap v. Dulles,* 356 U.S. 86, 100-01 (1958) (plurality opinion)). In the alternative, the defendant can show that, under the particular circumstances of his case, his sentence is grossly disproportionate to the crime he committed. *See Harmelin v. Michigan,* 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring). Miller fails to meet either of these avenues for relief.

8. *Evolving Standards of Decency*: To prove that "evolving standards of decency" render juvenile LWOP sentences unconstitutional, Miller bears the "heavy burden" of showing that "a national consensus against" juvenile LWOP sentences exists among the states. *Stanford v. Kentucky,* 492 U.S. 361 (1989) (holding that the death penalty for 16 and 17-old juveniles was constitutional based on national consensus) *overruled by Roper v. Simmons,* 543 U.S. 551 (2005) (holding that the death penalty for 16 and 17-old juveniles was unconstitutional based on a change in the national consensus). To determine whether Miller has met his burden, this Court must consider Miller's "evidence of a national consensus" against juvenile LWOP sentences, "as expressed in particular by the enactments of legislatures." *Roper,* 543 U.S. at 564. Miller has failed to meet his burden. In fact, Miller's cited evidence proves the opposite is true: A

strong national consensus exists *in favor* of LWOP sentences for juveniles.

9. In his motion, Miller fails to mention how many states statutorily allow LWOP sentences for juveniles. Instead, he argues that the small number of LWOP sentences *imposed* on persons 14 and under (that his attorney could find) proves a national consensus. (Miller's motion at 16-17) Of course, this fails for two reasons. First, the alleged "rarity" of imposed juvenile LWOP sentences could be due to any number of factors: few juveniles 14 and under commit capital murder; many 14-year-olds are adjudicated in juvenile/family court; a majority of those cases are pleaded to lesser included offenses; Miller's attorneys did not look hard enough or in the right places; etc. Second, and more importantly, the imposition of a juvenile LWOP sentence is not the correct proof of a national consensus against the sentence; whether the State legislature statutorily prevents it is. *Id.* When the correct standard is applied, the answer is apparent.

10. In his motion, Miller cites a 2005 study jointly conducted by Amnesty International and Human Rights Watch as proof that there is an *international* consensus against juvenile LWOP sentences.[2] (Miller's motion at 5-6) While the State maintains

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[2] The full study can be found at http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf. The State attaches the relevant portions of the study as Exhibit A.

that international treaties/law should have absolutely no bearing on United States and Alabama constitutional law, this study does contain informative statistics concerning LWOP sentences in the United States. According to this study, at least 41 states (82%) had LWOP sentences for juveniles in 2005. (Exh. A at 18.) Of these 41 states, 26 (63%) had "mandatory" LWOP sentences for juveniles in 2005. (Exh. A at 38) Additionally, at least 47 (94%) states had at least one "youth" serving a LWOP sentence in its state prison system in 2005. (Exh. A at 35-36.)

11. Assuming this study's findings are correct[3], Miller has clearly failed to meet his heavy burden of proving a national consensus against juvenile LWOP sentences exists among the state legislatures. In fact, Miller's cited proof shows the opposite: over 80% of states have created juvenile LWOP sentences by statute. Thus, Miller has failed to prove his sentence is unconstitutional based on "evolving standards of decency."

12. *Disproportionate to the Crime*: Miller also fails to show that his sentence of life imprisonment is

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[3] The State asserts that the study's estimate of the number of LWOP states is low, as is some of its information regarding the minimum age LWOP can be applied. For example, the study states that 16 years of age is the minimum for a LWOP sentence in Alabama, which is obviously incorrect as shown by this case. The State uses Miller's cited study to show Miller failed in his burden of proof, and it specifically reserves the right to provide its own statistics at the trial court and/or appellate levels if necessary.

grossly disproportionate to the facts of the crime he committed. In *Harmelin,* a three-member concurrence, led by Justice Kennedy, stated that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin,* 501 U.S. at 998 (Kennedy, J. concurring); *see also United States v. Bland,* 961 F.2d 123, 128-29 (9th Cir. 1992) (explaining the effect of *Harmelin's* split court on the application of a proportionality test on the Eighth Amendment).[4] To prove a sentence is grossly disproportionate under *Harmelin,* Miller must meet a "threshold [burden] whether [his] sentence was one of the rare cases in which a comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Bland,* 961 F.2d at 128-29 (quoting Harmelin, 501 U.S. at 998). If Miller fails to meet this threshold determination, "there is no need to compare his sentence with others across the nation." *Id.*

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[4] The State asserts that there should be no proportionality analysis under the Eighth Amendment, especially when the death penalty has not been imposed. *See Harmelin,* 501 U.S. at 965 ("We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). The State applies *Harmelin's* plurality test here because it is (apparently) controlling law. The State reserves the right to argue on appeal that the Eighth Amendment does not contain a proportionality guarantee.

13. Miller imposed upon Mr. Cannon a brutal death sentence. Consequently, the only sentence that is truly proportionate to the facts of Miller's crime would be a death sentence, which Miller cannot receive under *Roper*. Certainly, any sentence in which Miller is allowed to live out his life is not proportionately more severe than what Miller did to Mr. Cannon.

14. The *Harmelin* Court held that a LWOP sentence for possession of 24 ounces of cocaine failed to raise an inference of gross disproportionality. *See Harmelin*, 501 U.S. at 1004-05. Certainly, if a LWOP sentence is not disproportionate to drug possession, it is not disproportionate to capital murder. *See, e.g., Solem v. Helm*, 463 U.S. 277, 290 n.7 (1983) ("no sentence of imprisonment would be disproportionate" to felony murder); *Foster v. Withrow*, 159 F.Supp.2d 629, 643 (E.D. Mich. 2001) (holding that a mandatory LWOP sentence for a 16-year-old who committed first-degree murder was not grossly disproportionate under *Harmelin*).

15. Accordingly, Miller has failed to meet the threshold showing that his LWOP sentence is grossly disproportionate to the facts of his crime. Therefore, this Court need not compare Miller's sentence to sentences levied in other states for similar crimes (which, as stated above, is also life without parole in at least 41 states). *See Bland*, 961 F.2d at 128-29.

16. *Mandatory Nature of Sentence*: Miller next argues that, even if LWOP sentences are not *per se*

unconstitutional when applied to juveniles, the mandatory nature of Alabama's LWOP sentence for juveniles convicted of capital murder is unconstitutional because it fails to take into consideration the mitigating circumstances of the defendant's life. The United States Supreme Court rejected the same argument in *Harmelin*; that is, the Court rejected the notion that a sentencing court must consider mitigating circumstances of the defendant's life before imposing a mandatory LWOP sentence. *See Harmelin,* 501 U.S. at 994-96 ("There can be no serious contention [] that a sentence which is not otherwise cruel and unusual becomes so simply because it is mandatory.") Accordingly, the mandatory nature of Miller's sentence poses no constitutional problem here. In fact, this Court is foreclosed from finding such a violation under the Eighth Amendment because this issue has already been answered by the United States Supreme Court. *See State Oil Co. v. Khan,* 522 U.S. 3, 20 (1997) ("it is this Court's prerogative alone to overrule one of its precedents").

17. *Other Courts' Decisions*: Finally, the State lists just a handful of state courts across the country that have rejected the argument that a juvenile LWOP sentence is unconstitutional as cruel and unusual/disproportionate. *See, e.g., Tate v. Florida,* 864 So.2d 44 (Fla. App. 2003) (affirming mandatory LWOP sentence for 12-year-old murderer); *Pennsylvania v. Carter,* 855 A.2d 885 (Pa.2004) (affirming mandatory LWOP sentence for 16-year-old); *South Carolina v. Standard,* 569 S.E.2d 325 (S.Car. 2002)

(affirming LWOP sentence for 15-year-old burglar); *Tennessee v. Howell,* 34 S.W.3d 484 (Tenn. Ct. App.2000) (affirming three LWOP sentences for 14-year-old); *South Dakota v. Jensen,* 579 N.W.2d 613 (S.D.1998) (affirming LWOP sentence for 14-year-old); *North Dakota v. Garcia,* 561 N.W.2d 599, 611 (N.D.1997) (affirming LWOP sentence for 16-year-old); *Washington v. Massey,* 803 P.2d 340 (Wash. 1990) (affirming LWOP sentence for 13-year-old).

The same is true of federal circuit courts of appeals. *See, e.g., Harris v. Wright,* 93 F.3d 581, 584-85 (9th Cir.1996) (affirming LWOP sentence for 15-year-old); *Rice v. Cooper,* 148 F.3d 747, 751-52 (7th Cir.1998) (affirming LWOP sentence for 16-year-old); *Rodriguez v. Peters,* 63 F.3d 546, 566-68 (7th Cir.1995) (affirming LWOP sentence for 15-year-old).

For these reasons, the State requests this Court deny Miller's request to declare Miller's sentence of life without parole unconstitutional.

Respectfully submitted,

Troy King
Attorney General

/s/ Corey L. Maze
Corey L. Maze
Assistant Attorney General

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EXHIBITS

Exhibit A: **Excerpts from Amnesty International and Human Rights Watch article, "The Rest of Their Lives" http//hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.**

sty International and
:h article, "The Rest
ıttp//hrw.org/reports/
:ofTheirLives.pdf.

able 1: Minimum Age for Adult Prosecution and for Life without Parole Sentencing by State

tate	Lowest age at offense for which adult prosecution is possible	Minimum age at offence for LWOP sentencing	State	Lowest age at offense for which adult prosecution is possible	Minimum age at offense for LWOP sentencing
labama	14	16	Montana	12	12
laska	0	No LWOP	Nebraska	0	0
rizona	0	14	Nevada	8	8
rkansas	14	14	New Hampshire	13	13
alifornia	14	16	New Jersey	14	14
olorado	12	12	New Mexico	15	No LWOP
onnecticut	14	14	New York	13	No <18 LWOP
elaware	0	0	North Carolina	13	13
istrict of olumbia	0	No <18 LWOP	North Dakota	14	14
lorida	0	0	Ohio	14	14
eorgia	12	13	Oklahoma	7	13
lawaii	0	0	Oregon	0	No <18 LWOP
daho	14	14	Pennsylvania	0	0
llinois	13	13	Rhode Island	0	0
ndiana	0	16	South Carolina	0	0
owa	14	14	South Dakota	0	10
ansas	10	No <18 LWOP	Tennessee	0	0
entucky	14	No LWOP	Texas	14	Unknown
ouisiana	14	15	Utah	14	14
laine	0	No LWOP	Vermont	10	10
laryland	0	0	Virginia	14	14
lassachu-etts	14	14	Washington	0	15
lichigan	0	0	West Virginia	0	No LWOP
linnesota	14	14	Wisconsin	0	10
lississippi	13	13	Wyoming	13	13
lissouri	12	12	Federal	15	15

ource: National Center for Juvenile Justice, State Juvenile Justice Profiles, available online at: ıttp://www.ncjj.org/stateprofiles, accessed on June 6, 2005; *Second Changes: Juveniles Serving ife without Parole in Michigan Prisons* (American Civil Liberties Union (ACLU) of Michigan, 2004), p. 3, available online at: www.aclumich.org/pubs/juvenilelifers.pdf, accessed on September 3, 2005; *Juvenile Offenders and Victims: 1999 National Report*, p. 106; and state statutory esearch.

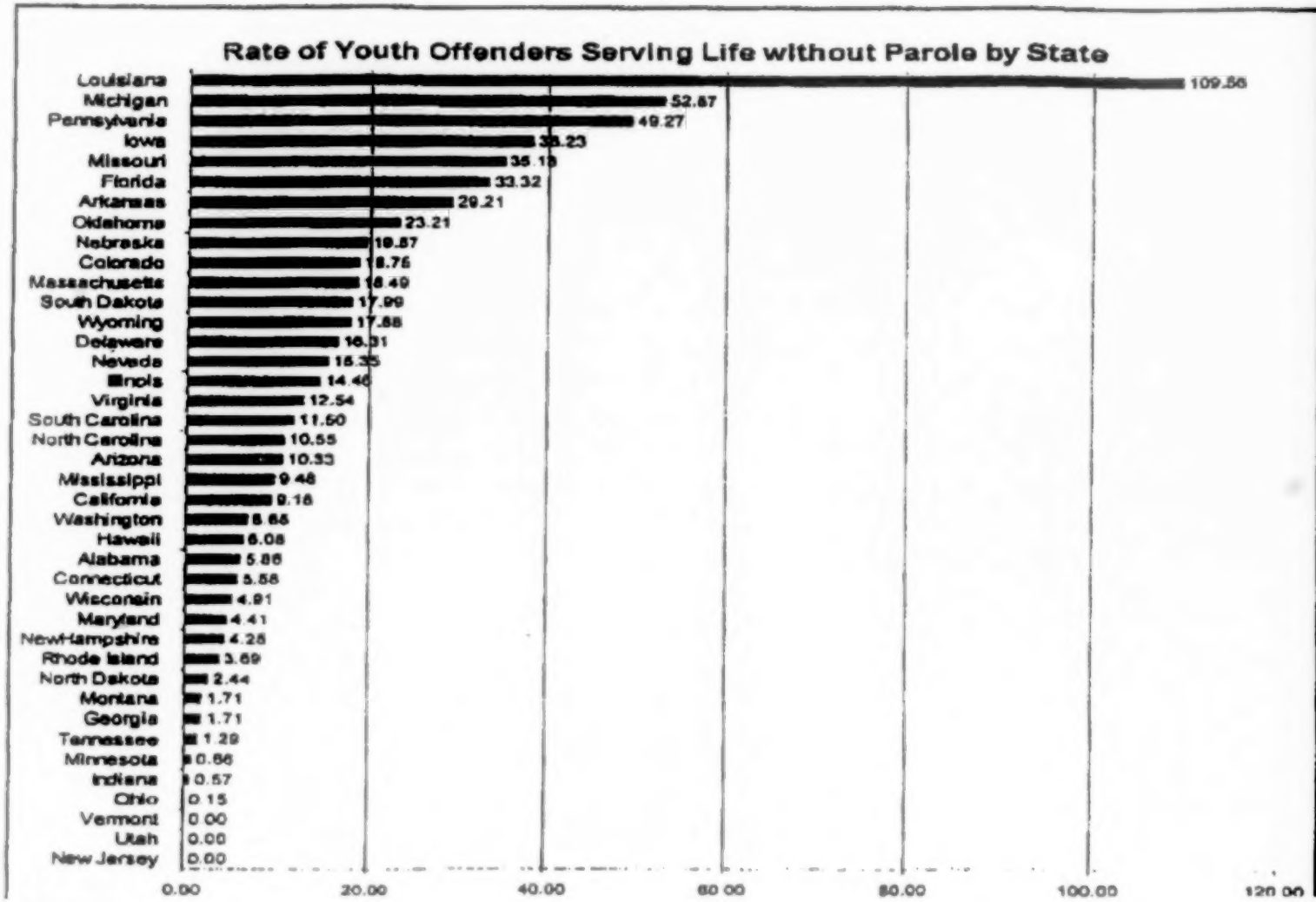
'able 5: Total Youth Serving Life without Parole by State

State	Youth LWOP Total		State	Youth LWOP Total
.labama	15		Montana	1
.rizona	30		Nebraska	21
.rkansas	46		Nevada	16
:alifornia	180		New Hampshire	3
'olorado	46		New Jersey	0
'onnecticut	10		North Carolina	44
)elaware	7		North Dakota	1
'ederal	1		Ohio	1
'lorida	273		Oklahoma	49
ieorgia	8		Pennsylvania	332
Iawaii	4		Rhode Island	2
daho	data missing		South Carolina	26
llinois	103		South Dakota	9
ndiana	2		Tennessee	4
owa	67		Utah	0
ouisiana	317		Vermont	0
Iaryland	3		Virginia	48
Iassachusetts	60		Washington	23
Iichigan	306		Wisconsin	16
Iinnesota	2		Wyoming	6
Iississippi	17			
Iissouri	116		**Nationwide**	**2225**

ource: Data provided by thirty-eight state correctional departments and additional other ources for the states of Alabama and Virginia

In Figure 6 below, we present the rates at which states impose the sentence relative to state youth populations. The range in the rates is extraordinary: Louisiana has the highest rate, 109.60 per 100,000 youth age fourteen to seventeen, a rate that is 730 times larger than Ohio's lowest rate of 0.15. The national rate is 14.20.

Figure 6


Rate of Youth Offenders Serving Life without Parole by State
Louisiana 109.86
Michigan 52.87
Pennsylvania 49.27
Iowa 39.23
Missouri 35.19
Florida 33.32
Arkansas 29.21
Oklahoma 23.21
Nebraska 19.87
Colorado 18.75
Massachusetts 18.49
South Dakota 17.99
Wyoming 17.88
Delaware 16.31
Nevada 15.35
Illinois 14.46
Virginia 12.54
South Carolina 11.50
North Carolina 10.55
Arizona 10.33
Mississippi 9.48
California 9.16
Washington 8.66
Hawaii 8.08
Alabama 5.86
Connecticut 5.56
Wisconsin 4.91
Maryland 4.41
New Hampshire 4.26
Rhode Island 3.69
North Dakota 2.44
Montana 1.71
Georgia 1.71
Tennessee 1.29
Minnesota 0.86
Indiana 0.57
Ohio 0.15
Vermont 0.00
Utah 0.00
New Jersey 0.00
0.00
20.00
40.00
60.00
80.00
100.00
120.00

Source: Data provided by thirty-eight state correctional departments and additional other sources for the states of Alabama and Virginia. Population data were obtained from Population Division, U.S. Census Bureau, "Table 2: Annual Estimates of the Population: April 1, 2000 to July 1, 2003," released in September 2004, available online at: http://www.census.gov/popest/states/asrh/SC-EST2003-02.html, accessed on September 6, 2005.

The differences in the state rates of life without parole for youth do not correlate directly to differences in rates of violent crime by youth. As shown in Figure 7, there are states with high rates of youth violence but low rates of youth with life without parole sentencing such as Delaware, Illinois, and Maryland; and there are states with the reverse: high rates of youth with the sentence and lower rates of youth crime, such as Pennsylvania and Michigan. Michigan's rate of youth crime is equal to New Jersey's; yet Michigan has sentenced 306 youth to life without parole, whereas New Jersey currently has zero youth servicing the sentence. Missouri, on the other hand, has both relatively high rates of youth crime and high rates of sentencing youth to life without parole.

'able 6: Mandatory or Discretionary Life without Parole by State

State	Mandatory LWOP	Rate* of Youth LWOP	State	Mandatory LWOP	Rate* of Youth LWOP
ouisiana	Mandatory Death (16+) or LWOP	10.96	California	Discretionary	0.92
lichigan	Mandatory LWOP	5.29	Washington	Mandatory LWOP	0.66
'ennsylvania	Mandatory Death (16+) or life sentence (no parole for life sentence)	4.93	Hawaii	Discretionary	0.61
owa	Mandatory LWOP	3.82	Alabama	Mandatory LWOP	0.59
lissouri	Mandatory LWOP	3.51	Connecticut	Mandatory LWOP	0.56
lorida	Mandatory Death (16+) or LWOP	3.33	Wisconsin	Mandatory LWOP	0.49
rkansas	Mandatory LWOP	2.92	Maryland	Mandatory LWOP	0.44
klahoma	Discretionary	2.32	New Hampshire	Mandatory LWOP	0.43
lebraska	Mandatory LWOP	1.96	Rhode Island	Mandatory LWOP	0.37
olorado	Mandatory LWOP	1.87	North Dakota	Discretionary	0.24
lassachu-etts	Mandatory LWOP	1.85	Georgia	Mandatory Death (16+) or LWOP	0.17
outh Dakota	Mandatory LWOP	1.80	Montana	Discretionary	0.17
Vyoming	Discretionary	1.79	Tennessee	Discretionary	0.13
elaware	Mandatory LWOP	1.63	Minnesota	Mandatory LWOP	0.07
evada	Discretionary	1.53	Indiana	Discretionary	0.06
llinois	Mandatory LWOP	1.45	Ohio	Discretionary	0.02
irginia	Mandatory Death (16+) or LWOP	1.25	New Jersey	Discretionary	0.00
outh Carolina	Mandatory Death (16+) or LWOP if prosecutor specifically requests either	1.15	Utah	Discretionary	0.00
lorth Carolina	Mandatory LWOP	1.06	Vermont	Discretionary	0.00
rizona	Mandatory Death (16+) or LWOP	1.03	Idaho	Mandatory Death (16+) or "fixed life sentence"	no data
lississippi	Discretionary	0.95			

*Rate per every 10,000 youth aged 14-17 in state population as of the 2000 Census.

Source: Sentencing statutes of forty-one states. For state totals, data provided by thirty-eight state correctional departments and additional other sources for the states of Alabama and Virginia.

IN THE CIRCUIT COURT
OF LAWRENCE COUNTY

STATE OF ALABAMA, Plaintiff,	)	
v.	)	CC-2006-68
EVAN JAMES MILLER, Defendant.	)	

NOTICE OF APPEARANCE & CORRECTION

(Filed Dec. 28, 2006)

The undersigned counsel, Corey L. Maze, hereby gives notice of his appearance in this case on behalf of the Attorney General of Alabama. The Attorney General appears in the trial-stage of this case for the limited purpose of answering Miller's challenge to the constitutionality of his mandatory sentence of life without parole.

The State also notes a correction to paragraph 10 of its answer to Miller's motion for a new trial/ sentence. In its answer, the State asserted that Amnesty International's 2005 study claimed that 47 of 50 (94%) states currently had at least one juvenile serving a LWOP sentence. Instead, the study claims that 38 of 41 (93%) states, plus the federal system, that allow for juvenile LWOP sentences currently have at least one juvenile serving a LWOP sentence.

Respectfully submitted,

/s/ Corey L. Maze
Corey L. Maze
Assistant Attorney General

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IN THE CIRCUIT COURT OF
LAWRENCE COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff v. EVAN MILLER, Defendant.	* * * * * * *	Case No. CC-2006-000068-00

REPLY TO STATE'S RESPONSE TO MOTION FOR A NEW TRIAL

(Filed Dec. 28, 2006)

Evan Miller is entitled to a new trial and relief from his unconstitutional sentence. On December 18, 2006, undersigned counsel received a pleading from the State in this case. The State's Response to Miller's Motion for a New Trial does not establish a basis for precluding relief to Mr. Miller. In brief reply to some of the State's arguments, Mr. Miller respectfully submits this pleading.

I. SENTENCING A FOURTEEN-YEAR-OLD TO DIE IN PRISON VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

1. Only two fourteen-year-old children have been punished in Alabama with a sentence of life without the possibility of parole. One of those children is Evan Miller. Evan is the only child in the United States

known to have been sentenced to life without parole for a crime committed at such a young age since the United States Supreme Court issued its opinion in *Roper v. Simmons*, 543 U.S. 551, 564 (2005). (Exh. A at ¶¶ 2-3, 7.) In light of his young age, the sentence imposed on Evan is cruel, unusual, excessive, and in violation of the requirements of the Eighth and Fourteenth Amendments to the United States [2] Constitution.

2. Undersigned counsel contend that children aged fourteen and younger are a distinct group of juvenile offenders for whom a sentence of life without parole is unconstitutional. The State's argument in response to Mr. Miller's Motion for a New Trial treats Mr. Miller's claims as if they applied to all juveniles, rather than only to those children who were fourteen or younger at the time of the crime for which they were convicted. As a result of the State's misapprehension of Mr. Miller's argument, the State repeatedly cites statistics that are inappropriate and misleadingly suggest that life without parole is imposed on fourteen year olds far more frequently than it actually is.

3. For example, the State contends that, according to a study by Amnesty International and Human Rights Watch, "at least 47 (94%) states had at least one 'youth' serving a LWOP sentence in its state prison system in 2005." (State's Response at ¶ 10.) It should be emphasized first that even within the parameters that the State is using (referring to all juveniles rather than those fourteen and under), this

statement is incorrect. The exhibit attached by the State in its responsive pleading reveals that ***37 states, not 47***, had prisoners serving a LWOP sentence in 2005 for crimes committed when they were under eighteen. Moreover, only nineteen states have imposed a sentence of life without parole on someone who was fourteen or younger at the time of the crime. (Exh. A at ¶ 7). Thus, while a majority of states have imposed sentences of life without parole on people aged seventeen or younger, only a small minority have imposed such sentences on people, like Evan, who [3] were fourteen or younger.

4. The State's misapprehension of the issue presented here – whether it is unconstitutional to sentence children fourteen and younger, rather than all juveniles, to life without parole – results in other misapplied numbers and claims. For example, according to the statistics cited by the State, Louisiana has the highest rate of juvenile offenders serving life without parole of any state. (State's Response, Exh. A, at 36.) However, in Louisiana, fourteen-year-olds are statutorily prohibited from facing sentences that would incarcerate them past their thirty-first birthdays. La. Rev. Stat. Ann. Art. 857B. In other words, even in the state where life without parole is most commonly imposed on juveniles, Evan Miller would be legally protected from the sentence he has received.

5. The exhibit attached by the State also represents that 2225 people in the United States have been sentenced to life without parole for crimes committed at age seventeen or younger. (State's Response, Exh.

A, at 35.) However, only a tiny percentage of that number involves people who committed the crimes for which they were sentenced at age fourteen or younger. No more than five dozen children fourteen years old or younger have been sentenced to die in prison in the United States. Moreover, with the exception of Evan Miller, none of those children were sentenced after the United States Supreme Court issued its opinion in *Roper v. Simmons*, 543 U.S. 551, 564 (2005). ((Exh. A. at 7.)

6. The State also makes the mistake of referring to all juvenile LWOP sentences, rather than just those imposed on people fourteen and under, when it cites cases from seven [4] state appellate courts and three federal circuit courts that affirm sentences of life without parole for juveniles. (State's Response at ¶ 17.) Only three of those ten cases involved people aged fourteen or younger who were sentenced to life without parole.[1]

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[1] Moreover, the State misrepresents the holding of one of the three cases that did involve a child under age fifteen, contending that *Tate v. Florida*, 864 So. 2d 44 (Fla. App. 2003), "affirm[ed] mandatory LWOP sentence for 12-year-old murderer." (State's Brief at 17.) In fact, the Florida appellate court in *Tate* reversed the judgment and sentence and remanded for a new trial, and Lionel Tate was freed before his seventeenth birthday after accepting a plea agreement. Abby Goodnough, "Florida Youth Who Got Life Term for a Killing is Freed at Sixteen," N.Y. Times, Jan. 27, 2004, at A12.

7. Finally, the State errs in its contention that "the imposition of a juvenile LWOP sentence[2] is not the correct proof of a national consensus against the sentence; whether the State legislature statutorily prevents it is." (State's Response at ¶ 9.) A long line of Supreme Court cases makes it clear that courts should look to the actual frequency with which a punishment is imposed in determining whether it is cruel and unusual under the Eighth Amendment. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding juvenile death penalty unconstitutional and noting "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent"); *Atkins v. Virginia*, 536 U.S. 304 (2002) (determining that national consensus against execution of mentally retarded exist based in part on fact that "even among those States that regularly execute offenders and that have no prohibition with regard to the mentally retarded, only five have executed offenders [5] possessing a known IQ less than 70 since we decided *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)]"); *Enmund v. Florida* 458 U.S. 782, 794-96 (1982) (Court considered actual number of people sentenced to death for accomplice liability in felony murder cases in determining that such sentences violated Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584, 596-97

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[2] Again, the relevant inquiry in this case is not the frequency with which "juvenile LWOP" is imposed, but the frequency with which people aged fourteen and under are sentenced to life without the possibility of parole.

(1977) (Court looked to rarity of death sentences for rape of adult woman in concluding that death penalty is unconstitutionally cruel and unusual punishment for that crime.)

8. The practice of sentencing fourteen-year-olds to life imprisonment without parole is so infrequent as to render it an arbitrary and "unusual" punishment prohibited by the Eighth Amendment. Evan Miller is one of only two fourteen-year-old children to be sentenced to die in prison in the state of Alabama. He is the only fourteen year old in the country known to have received such a sentence after the United States Supreme Court's decision in *Roper v. Simmons*. The extreme rarity with which fourteen-year-old children are sentenced to life imprisonment without the possibility of parole reflects community norms and values that have evolved and reject life without parole sentencing for young children Evan's age. Accordingly, Evan's sentence violates the Eighth Amendment's prohibition against cruel and unusual punishments and should be vacated.

CONCLUSION

9. For the above stated reasons, Mr. Miller respectfully asks this Honorable Court to vacate his conviction and order a new trial, or, in the alternative, to vacate his sentence of life without the possibility of parole, and impose a sentence of life with the possibility of [6] parole.

Respectfully submitted this 21st day of December, 2006.

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EXHIBIT A

MONTGOMERY COUNTY	*
	*
STATE OF ALABAMA	*

AFFIDAVIT OF REBECCA KILEY

1. My name is Rebecca Kiley. I live in Montgomery, Alabama, where I am employed by the Equal Justice Initiative.

2. My educational background includes a B.A. from Harvard in 1998 where I graduated *summa cum laude*. I also hold a J.D. degree from the New York University School of Law which I earned in 2004 *cum laude*. I have completed a federal judicial clerkship with U.S. Circuit Court Judge Eric Clay on the Sixth Circuit United States Court of Appeals. I am also a member of the State Bars of Alabama, New York and Massachusetts.

2. I have conducted research into the number of people in Alabama who have been sentenced to life without the possibility of parole for crimes committed at the age of fourteen or younger. I have conducted an exhaustive review of published decisions in the Alabama courts as well as of Alabama press clippings, court files, and electronic databases. I also consulted with the Alabama Department of Corrections.

3. Based on my research, I have concluded that there are currently only two people in the state of Alabama serving sentences of life without parole for crimes committed at the age of fourteen or younger. One of those people is Evan Miller.

5. The Alabama Criminal Justice Information Center reports information on the number of juveniles arrested for homicide in Alabama. The Alabama Criminal Justice Information Center is a state agency established by the Alabama Legislature to collect, analyze, and disseminate information relating to crime in Alabama. The Alabama Criminal Justice Information Center reports that in the ten-year period between 1995 and 2004, 312 juveniles were arrested for [2] homicide

in Alabama. That number includes the only two fourteen-year-olds in Alabama to have been sentenced to life without parole.

6. I have also conducted research into the number of people nationwide who have been sentenced to life without the possibility of parole for crimes committed at the age of fourteen or younger. I have exhaustively reviewed published decisions and news articles in electronic databases. I have consulted with juvenile justice scholars and practitioners. I have been in contact with the Department of Corrections for every state in the country.

7. Based on this research, I have identified no more than five dozen people, in nineteen states, who are currently serving sentences of life without the possibility of parole for crimes committed at age 14 or younger. With the exception of Evan Miller, none of those people were sentenced after the United States Supreme Court issued its opinion in *Roper v. Simmons* in 2005.

8. The United States Department of Justice publishes information in its Uniform Crime Reports regarding the number of people aged fourteen or under who are arrested for murder or non-negligent manslaughter every year in the United States. According to the Department of Justice's Uniform Crime Reports, 1343 children aged fourteen or under were arrested for murder or non-negligent manslaughter in the ten-year period between 1995 and 2004.

I have read this affidavit. Everything in this affidavit is the truth. I swear under penalty of perjury that the above and foregoing is a true and correct statement.

/s/ Rebecca Kiley — December 21, 2006
Rebecca Kiley — Date

Subscribed and sworn before me this 21st day of December, 2006.

/s/ Kingsley B. Eaton — My commission expires
Notary Public — 5/18/09 .

ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 2009-2010

CR-06-0741

Evan Miller

v.

State of Alabama

Appeal from Lawrence Circuit Court
(CC-06-68)

On Application for Rehearing

(Filed Aug. 27, 2010)

WINDOM, Judge.

This Court's opinion of June 25, 2010, is withdrawn, and the following opinion is substituted therefore.

[2] Evan Miller appeals his conviction of murder made capital because it was committed during the course of an arson, *see* § 13A-5-40(a)(9), Ala. Code 1975, and his resulting sentence of life in prison without the possibility of parole. For the reasons that follow, this Court affirms Miller's conviction and sentence.

The evidence presented at trial established that in July 2003, then 14-year-old Evan Miller and his 16-year-old codefendant, Colby Smith, robbed and

savagely beat Miller's neighbor, Cole Cannon.[1] After beating Cannon to the point that he could not get off the floor, Miller set Cannon's trailer on fire. Cannon's body was later discovered by firefighters, who were called to extinguish the fire.

Colby Smith testified that he became acquainted with Miller during high school and that they had known each other for approximately four or five months before the crime. (R. 979.) On the evening of July 15, 2003, Smith was spending the night at Miller's trailer. Around midnight, Cannon came over [3] complaining that he had burned his food and asking if they had something he could eat. Cannon appeared to have been drinking, and Smith smelled alcohol on his breath and noticed that he was "staggering." (R. 710, 980.) While Miller's mother was preparing some spaghetti for Cannon, Miller and Smith went over to Cannon's trailer to look for drugs, but they were unable to find any. The two, however, found and stole some of Cannon's baseball trading cards. Miller and Smith then returned to Miller's trailer.

When Cannon finished eating, he returned to his trailer. Miller and Smith then went back to Cannon's trailer intending to get Cannon intoxicated and to steal his money. Miller and Smith smoked a joint and

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[1] Miller's case was transferred from the Juvenile Court of Lawrence County to the Lawrence Circuit Court for prosecution as an adult. *See Ex parte E.J.M.*, 928 So. 2d 1081, 1082 (Ala. 2005).

played drinking games with Cannon until he passed out on the couch. While Cannon was unconscious, Miller stole Cannon's wallet and took it into the bathroom where he split a little over $300 with Smith. While Miller was attempting to put the wallet back in Cannon's pocket, Cannon jumped up and grabbed Miller around the throat. Smith, who witnessed the altercation, grabbed a baseball bat and hit Cannon on the head. Miller then climbed onto Cannon and began hitting him in the face with his fists. Despite [4] Cannon's pleas to stop. Miller picked up the bat, which Smith had dropped, and continued to attack Cannon by striking him with it repeatedly.

Afterwards, Miller placed a sheet over Cannon's head and told him, "I am God, I've come to take your life." (R. 986.) After Miller hit Cannon a final time with the bat, Miller and Smith returned to Miller's trailer. A few minutes later, however, Miller and Smith returned to Cannon's trailer and attempted to clean up the blood. Afterwards, Miller and Smith set several fires to cover up their crime. Initially, Smith used a lighter to start a fire on a couch in the back bedroom, while Miller set another fire on a different couch "to cover up the evidence." (R. 990.) As they were leaving, Smith saw Cannon "[j]ust laying there." Feeling sorry for Cannon, Smith placed a towel under his head in an attempt to stop the bleeding. Smith also turned on the faucet in the kitchen sink and stopped it up, hoping that the water would extinguish the fires. As they were leaving Cannon's trailer, Smith heard Cannon asking, "Why are y'all doing this

to me?" (R. 990-91.) Approximately 10 minutes later, Smith returned to Cannon's trailer alone. He could hear Cannon coughing but "smoke was [5] coming out and [Miller was] coming behind [him,]" so he returned to the Miller's trailer. (R. 992.)

Firefighters, who were called to the trailer park to extinguish the fire at Cannon's trailer, noticed blood on the coffee table and blood spatters on the wall. This led the firefighters to the discovery of Cannon's body in the hallway leading to the back bedroom. Fire Marshal Richard Montgomery, who conducted the initial investigation, concentrated on the north bedroom where most of the damage from the fire occurred. The investigation was later turned over to Investigator Tim Sandlin of the Sheriff's Department after Fire Marshal Montgomery indicated that the fire was "obviously suspicious." (R. 796, 798-802.) After talking with Cannon's family members, Investigator Sandlin became aware that certain items, including Cannon's wallet and some trading cards, were missing from the trailer. Cannon's wallet was eventually recovered from underneath the couch in his trailer, but his driver's license was missing. Investigator Sandlin also removed a baseball bat from underneath the couch.

After this discovery, Investigator Sandlin went to Miller's trailer to speak with Miller and his mother, Susan. [6] Susan gave Investigator Sandlin a box of trading cards, and Miller and his mother agreed to ride with him to the sheriff's office to give statements.

At the sheriff's office, Investigator Sandlin obtained basic information from Miller and read him his rights from the juvenile *Miranda* form, which Miller and his mother both signed before Miller began recounting the events of the night of July 15 and the early morning of July 16. In his statement, Miller initially told Investigator Sandlin that on the evening of July 15, he was at his trailer watching a movie. Although he admitted that Cannon came over to their trailer, he denied going over to Cannon's trailer. Miller also claimed that he did not learn about the fire at Cannon's trailer until the fire department arrived the next morning. However, when Investigator Sandlin asked Miller to begin by describing the morning's events and work backwards to the previous evening, Miller became "frustrated and agitated" and told Investigator Sandlin "to forget all that, that that wasn't true." (R. 706-07.) Miller then requested that everyone except Investigator Sandlin leave the room. After Miller's mother and juvenile officers left the room, Miller gave Investigator Sandlin [7] another statement, which Sandlin typed up for Miller to read and sign.

In his second statement, Miller explained that, on the evening of July 15, his family was getting ready to go to bed when Cannon came over to use the telephone. While Cannon was at his trailer, Miller went over to Cannon's trailer where he found some trading cards that "looked like they were worth money." (R. 710.) When Cannon came back to the Millers' trailer around midnight to get something to

eat, Miller went to Cannon's trailer to get the cards. Around 2:00 or 3:00 a.m., Miller and Smith returned to Cannon's trailer to drink beer. According to Miller, as the evening progressed, Cannon became so intoxicated that he had trouble standing and eventually fell down, hitting his nose and lip on the table. Miller stated that when he tried to assist Cannon, Cannon grabbed him by the throat. Miller said Smith pushed Cannon off of him just as Cannon grabbed a bat and hit Miller on the arm. Smith then grabbed the bat from Cannon and hit Cannon on the arm. Afterwards, Smith threw the bat down and Miller kicked it under the couch. Miller then punched Cannon several times in the face before seeing Cannon's wallet on the floor [8] and taking about $300 in cash and a driver's license. After hearing Miller's mother knock on the front door and tell them that the police were on the way, Miller and Smith ran out the back door. As they were leaving, they could hear Cannon asking, "Why did you do this to me?" (R. 711-12.)

Based on Miller's statement, Investigator Sandlin called Deputy Fire Marshal Lyndon Blaxton to let him know that he had "additional information" on the fire. (R. 806.) As a result, Deputy Blaxton, Investigator Sandlin, and other law-enforcement agents agreed to meet at Cannon's trailer on July 24, 2003, to conduct a full fire investigation. During the investigation, Deputy Blaxton noticed blood spatters on the wall, a table, a pillow, and a towel. (R. 807-08.) Deputy Blaxton also identified four points of origin for the fires, including a large one in the south bedroom,

which spread down the hallway; a second one on the bed, which had been completely consumed by fire; a third one on the couch; and a fourth one, which originated from a cushion that had been placed on the floor before being set on fire.

Forensic pathologist Dr. Adam Craig performed the initial external examination on Cannon's body. Because he claimed [9] there was no indication that Cannon's death had resulted from a crime, Dr. Craig did not perform a full autopsy, and he initially ruled that Cannon's death was an accident caused by the inhalation of smoke and soot. After further investigation, however, Investigator Sandlin requested that Cannon's body be exhumed so that a full autopsy could be performed. On August 1, 2003, Dr. Craig performed a full autopsy and discovered several injuries not caused by the fire, including a two-inch contusion to the left side of the forehead caused by blunt force and six rib fractures on both sides of the body. Dr. Craig was also able to determine from hemorrhaging that these injuries occurred before Cannon died. Toxicology analysis showed Cannon's blood-alcohol level to be .216. Based upon these findings, Dr. Craig reaffirmed his initial finding that the cause of Cannon's death was "inhalation of products of combustion," but added that "multiple blunt force injuries and ethanol intoxication" were contributing factors that made it more difficult for Cannon to breathe in the fire or to escape from the burning trailer. (R. 939-40.)

[10] Deputy Tim McWhorter of the Lawrence County Sheriff's Department testified that on July 31, 2003, and August 4, 2003, he transported Miller from the Tennessee Valley Detention Center to two different mental-health evaluations. Deputy McWhorter stated that although he engaged in "small talk" with Miller, he did not interrogate him, talk about the murder investigation, threaten him, or offer Miller any benefit for making a statement. During their first trip, Miller asked Deputy McWhorter "if he had previously told something that wasn't true but now wanted to go back and tell the truth, would he get in any trouble." Miller also told Deputy McWhorter that he deserved "to do some time in a correctional facility, that he was not innocent and he had been involved in the assault on Mr. Cole Cannon." (R. 871.) Similarly, during their August 4 trip, Miller told Deputy McWhorter that he "had been really messed up" when Cannon died, because he had taken two Klonopin tablets and had drunk most of a fifth of whiskey. (R. 873.) Miller stated that he and Smith went to Cannon's trailer after Cannon told them that he had some "acid," but when they got there, Cannon refused to discuss anything but music. When they attempted to leave, [11] Cannon grabbed Miller by the neck. Miller then "slammed Mr. Cannon really hard" because he was "really pissed off." Miller knew that the autopsy would have revealed marks and bruises because "they had roughed him up pretty good." Miller said that he could not remember everything, but "the more he thought about it, the more it made him think he

started the fire." (R. 874.) The following morning, Smith told Miller that Cannon had died in the fire.

Nancie Jones, the head of the DNA section of the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences, testified that she examined numerous items for the presence of DNA. Several items, including an aluminum bat, a towel, and a portion of a gold cushion tested positive for human blood, but Jones was unable to obtain usable DNA profiles from the blood on the bat or the towel. Jones was able to use the blood taken from the gold cushion to create a DNA profile, which was consistent with the DNA sample taken from Cannon during the autopsy. Jones was also able to exclude both Miller and Smith as sources for the DNA found on the cushion. The bloodstains from the wall in Cannon's trailer were also consistent with Cannon's DNA profile and [12] inconsistent with Miller's and Smith's DNA profiles. Jones also found bloodstains consistent with Miller's DNA profile on an Old Navy brand t-shirt and on the underarm portion of a Hanes brand t-shirt. Jones could not exclude Cannon as a second source of blood on the Hanes t-shirt; however, the blood spatters on the shirt were consistent with someone being hit with an object rather than being shot with a gun.

I.

Miller first argues that his sentence of life in prison without the possibility of parole for the capital

offense of murder during an arson is disproportionate and thus violates the Eighth Amendment to the United States Constitution. Specifically, Miller argues that the State may not, consistent with the Eighth Amendment, sentence an individual who was 14 years old at the time of the crime to life in prison without the possibility of parole. Miller relies on the holding of Supreme Court of the United States in *Roper v. Simmons*, 543 U.S. 551 (2005), to support his proposition that 14-year-olds are categorically prohibited from being sentenced to life in prison without the possibility of parole for capital murder. [13] For the reasons that follow, this Court rejects Miller's argument.

In *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010), the Supreme Court of the United States explained that generally there are two classifications of proportionality challenges to sentences. "The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case." *Graham*, ___ U.S. at ___, 130 S. Ct. at 2021. Under this approach, courts must determine "whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime." *Graham*, ___ U.S. at ___, 130 S. Ct. at 2022.

"The second classification of cases has used categorical rules to define Eighth Amendment standards." *Id.* "Th[is] classification in turn consists of two subsets, one considering the nature of the offense, the other considering the characteristics of

the offender." *Id.* Under the categorical challenge to a sentence:

> "[c]ourt[s] [must] first consider[ ] objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by the standards elaborated by controlling [14] precedents and by the [c]ourt's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose, [c]ourt[s] must determine in the exercise of [their] own independent judgment whether the punishment in question violates the Constitution."

Id. (internal citations and quotations omitted).

Here, Miller raises only a categorical challenge to his sentence of life in prison without the possibility of parole.[2] Specifically, Miller argues that "a particular type of sentence [life in prison without the possibility of parole] as it applies to an entire class of offenders [14-year-olds]," is unconstitutional. *Id.* Accordingly, this Court must determine whether Miller met his burden to establish that 14-year-olds who have been convicted of capital murder may not, consistent with the Eighth Amendment, be sentenced to life in prison

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[2] Miller does not challenge his sentence as grossly disproportionate to the offense, i.e., the first classification for proportionality challenges. Therefore, this Court does not reach that issue.

without the possibility of parole. *See Harris v. Wright*, 93 F.3d 581, 583 (9th Cir.1996) (recognizing that the appellant bears a heavy burden to establish that his sentence is cruel and unusual); *Cf. United States v. Johnson*, 451 F.3d 1239, 1243 (11th Cir. 2006) (explaining that the appellant bears the [15] burden to establish that his sentence in disproportionate); *Cole v. State*, 721 So. 2d 255, 260 (Ala. Crim. App. 1998) (recognizing that the appellant has the burden to establish that a State statute is unconstitutional); *Holmes v. Concord Fire Dist.*, 625 So. 2d 811, 812 (Ala. Civ. App. 1993) ("The party mounting a constitutional challenge to a statute bears the burden of overcoming a presumption of constitutionality.").

A.

As the Court explained in *Graham*, ___ U.S. at ___, 130 S. Ct. at 2023: "The analysis begins with objective indicia of national consensus." "'[T]he "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."'" *Id.* (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002), quoting in turn *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). In addition to legislation, courts must also consider "[a]ctual sentencing practices." *Id.* Based on the record, this Court cannot say that Miller has met his heavy burden of establishing a national consensus against sentencing 14-year-olds who have [16] been convicted of capital murder to life in prison without the possibility of parole.

Regarding juvenile offenders in general, 44 states, the District of Columbia, and the federal government permit a sentence of life in prison without the possibility of parole for homicide offenses. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2030. According to the statistics submitted by Miller, 36 states permit a sentence of life in prison without the possibility of parole for offenders who were 14 years of age or younger at the time of the offense.[3] (C.R. 139.) According to an affidavit submitted by Rebecca Kiley, an attorney with the Equal Justice Initiative (the organization representing Miller on appeal), Ms. Kiley conducted research regarding the number of 14-year-olds sentenced to life in prison without the possibility of parole, and she could "identif[y] no more than five dozen . . . in nineteen states. . . ." (C.R. 170.) Ms. Kiley also states that between 1995 and 2004, 1,343 individuals were arrested for murder or non-negligent manslaughter.

[17] The evidence contained in the record fails to establish how many 14-year-olds in this State or nationwide have been convicted of homicide offenses. More importantly, the record fails to establish how many individuals 14 years of age or younger have been convicted of capital murder or aggravated murder. Further, nothing in the record indicates how

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[3] This exhibit indicates that in Alabama, the minimum age an individual may be sentenced to life in prison without the possibility of parole is 16. As this case establishes, that information is inaccurate.

many 14-year-olds have been sentenced to life in prison without the possibility of parole as a result of a conviction for a homicide, aggravated murder, or capital murder. Although the Kiley affidavit indicates that few 14-year-olds have been sentenced to life in prison without the possibility of parole, with no information relating to the number of 14-year-olds actually convicted of homicide offenses, the number is of little value. For instance, the small number of 14-year-olds serving a sentence of life in prison without the possibility of parole could be attributable to the few numbers of 14-year-olds actually convicted of homicide offenses.[4]

[18] With 44 states, the District of Columbia, and the federal government permitting a sentence of life in prison without the possibility of parole for juveniles convicted of homicide offenses, *see Graham*, ___ U.S. at ___, 130 S. Ct. at 2034-35, 36 states permitting a sentence of life in prison without the possibility of parole for offenders 14 years of age or younger at the time of the offense (C.R. 139), and no evidence in the record relating to "[a]ctual sentencing practices," *Graham*, ___ U.S. at ___, 130 S. Ct. at 2023, for

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[4] The Kiley affidavit states that, between 1995 and 2004, 1,343 individuals 14 years old or younger have been arrested for homicide crimes. (C.R. 170.) Without knowing how many of those individuals were eventually convicted, these numbers establish very little. Further, because the age range is birth to 14 years old, it is impossible to determine how many of those 1,343 individuals that were arrested were eligible to be tried as adults.

14-year-olds convicted of capital murder, this Court cannot say that Miller has met his burden of establishing a national consensus against sentencing 14-year-olds who have been convicted of capital murder to life in prison without the possibility of parole.

B.

Although Miller failed to establish that a national consensus exists, his failure does not end this Court's analysis. As the Supreme Court explained in *Graham*:

> "Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual. *Kennedy*, 554 U.S., [19] at ___, 128 S.Ct., at 2658. In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.' *Roper*, 543 U.S., at 575, 125 S.Ct. 1183. The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. *Id.*, at 568, 125 S.Ct., 1183; *Kennedy*, supra, at ___, 128 S.Ct., at 2659-60; *cf. Solem*, 463 U.S., at 292, 103 S.Ct. 3001. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals. *Kennedy*, supra, at ___, 128 S.Ct., at 2661-65;

> *Roper*, supra, at 572, 125 S.Ct. 1183; *Atkins*, supra, at 318-320, 122 S.Ct. 2242."

Graham, ___ U.S. at ___, 130 S. Ct. at 2026.

In exercising independent judgment, this Court must first consider the inherent characteristics of the offender that render that individual less culpable and thus might place him in a category or class of individuals for which a particular punishment is prohibited.[5] *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that individuals who commit murder before the age of 18 are less culpable than individuals over the age of 18 and thus may not constitutionally be sentenced to death); [20] *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that individuals who are mentally retarded are less culpable and thus may not constitutionally be sentenced to death). In the present case, Miller was a juvenile when he committed capital murder; therefore, he must be considered less culpable than adult offenders. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2026 (citing *Roper*, 543 U.S. at 569) ("[B]ecause juveniles have lessened culpability[,] they are less deserving of the most severe punishments."). Although his age makes him categorically less culpable than an adult offender, Miller did not establish

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[5] Because Miller seeks a rule categorically barring the imposition of a particular sentence for a class of individuals, this Court is concerned only with characteristics common to the class as a whole, such as age or mental retardation. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

any other natural infirmity that places him in a less culpable category. For instance, although Miller was diagnosed with multiple disorders, such as conduct disorder, attention-deficit disorder, and personality disorder, he was not diagnosed with a severe mental disease or defect. Further, Miller has an IQ in the average range. (R. 1186-87.) *See Roper v. Simmons*, 543 U.S. 551 (2005) (holding that individuals who commit murder before the age of 18 are less culpable than individuals over the age of 18 and thus may not constitutionally be sentenced to death). Accordingly, this [21] Court holds that Miller's age alone places him in a less culpable class of offenders.

Next, this Court must consider the crime and circumstances of the crime for which Miller has been convicted. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2027. The Supreme Court of the United States has repeatedly held that non-homicides and unintentional homicides fall within a category of offenses that are less culpable and thus undeserving of the ultimate penalty. *See Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the State may not impose a sentence of death on a defendant convicted of an unintentional homicide); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the State may not impose a sentence of death for rape). Miller was convicted of capital murder, a crime that is not included in any category of offenses that are less culpable and thus undeserving of the ultimate penalty. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2027 (recognizing the distinction

between intentional homicide offenses and non-homicide offenses).

Moreover, the circumstances of Miller's crime do not indicate that his crime falls within a category of less [22] culpable offenses. Here, Miller and his accomplice beat Cannon with a bat until he was unable to get up. After rendering Cannon unable to get up, Miller placed a sheet over Cannon's head and stated, "Cole, I am God, I've come to take your life." Miller then set Cannon's trailer on fire. Cannon, still alive, asked, "Why are y'all doing this to me?" Cannon eventually died from smoke inhalation. This intentional and horrendous crime could have, but for Miller's age, made him eligible for a sentence of death in Alabama, *see* § 13A-5-40(a)(9), Ala. Code 1975; § 13A-5-49(8), Ala. Code 1975, and certainly does not lessen his culpability. *Cf. Kennedy v. Louisiana*, ___ U.S. ___, ___, 128 S. Ct. 2641, 2650 (2008) (holding that individuals who have not taken a human life are less culpable than capital murderers and thus may not constitutionally be sentenced to death).

This Court must next consider the severity of the sentence in light of the individual's culpability and the nature of the crime. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2027 (holding that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" and thus cannot be sentenced to life in prison without the [23] possibility of parole). Here, Miller was sentenced to the second harshest punishment – life in prison without the possibility of parole – for committing a crime that falls

within the category of the worst offenses, capital murder. Although "[l]ife without parole is an especially harsh punishment for a juvenile," *Graham*, ___ U.S. at ___, 130 S. Ct. at 2027, such a sentence is not overly harsh when compared to the crime of which Miller was convicted. This conclusion is buttressed by the Supreme Court's decision in *Graham*. There, the Court considered whether a sentence of life in prison without the possibility of parole for a juvenile who committed a non-homicide offense was categorically unconstitutional. *Id.* In analyzing the constitutionality of Graham's sentence, the Court determined that "when compared to an adult murderer, a *juvenile* offender who *did not kill or intend to kill* has a twice diminished moral culpability" and thus cannot be subjected to the "the second most severe penalty permitted by law." *Graham*, ___ U.S. at ___, 130 S. Ct. at 2028 (emphasis added and citations and quotations omitted). Unlike Graham, Miller committed capital murder and thus does not have "twice diminished moral culpability." *Id.* [24] Likewise, although Miller committed one of Alabama's worst offenses, he was sentenced to the second harshest penalty. *Cf. Graham*, ___ U.S. at ___, 130 S. Ct. at 2032 (specifically restricting its holding to non-homicide crimes). Considering Miller's age and his crime, this Court holds that Miller's sentence of life in prison without the possibility of parole for capital murder is not categorically disproportionate.

Finally, this Court must consider the legitimate penological goals that Miller's sentence serves. The

Supreme Court has recognized the following legitimate penological goals: retribution, deterrence, incapacitation, and rehabilitation. *See Graham*, ___ U.S. at ___, 130 S. Ct. at 2028-29. This Court holds that deterrence, retribution, and incapacitation are all legitimate penological goals for juveniles who have committed capital murder and therefore justify a sentence of life in prison without the possibility of parole. As stated above, but for Miller's age, he could have been sentenced to death for his crime. In overturning the death penalty for juveniles, the Supreme Court recognized that "the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in [25] particular for a young person" and thus will serve as an adequate deterrent to potential juvenile, capital offenders. *Roper*, 543 U.S. at 572. Further, the State has a legitimate penological goal to seek retribution for juveniles who commit capital murder. As the Supreme Court has explained, "'[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" *Graham*, ___ U.S. at ___, 130 S. Ct. at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)). Here, Miller was sentenced to the second harshest punishment for committing one of the worst crimes. He does not have, as the Supreme Court described, "a twice diminished moral culpability"; therefore, the State's retribution interest is properly served by the imposition of the second harshest sentence. *Graham*, ___ U.S. at ___, 130 S. Ct. at 2028. Finally, this Court cannot hold that the State lacks a legitimate goal to

incapacitate a juvenile when that individual is willing to take, and has taken, a human life.

In sum, Miller committed the worst crime recognized in Alabama, capital murder, and, solely because of his age, was not eligible for the harshest penalty. Based on the [26] foregoing, this Court holds that Miller's sentence of life in prison without the possibility of parole – the second harshest sentence – for capital murder does not violate the Eighth Amendment. Therefore, this issue does not entitle Miller to any relief.

II.

Miller next argues that his mandatory sentence of life in prison without the possibility of parole violated his constitutional right to individualized sentencing. Specifically, Miller argues that the Eighth Amendment requires individualized consideration of any mitigation a defendant wishes to offer. Miller then argues that the mandatory minimum sentence for capital murder is unconstitutional because it does not allow for the consideration on mitigation. This argument is without merit.

In *Harmelin v. Michigan,* the Supreme Court rejected the argument that mandatory minimum sentences – not involving the death penalty – violated the Eighth Amendment. 501 U.S. 957, 995-96 (1991). In rejecting the same argument Miller now makes, the Court held that the Constitution does not require individualized sentencing or consideration of

mitigation [27] except in cases involving a sentence of death. *Id. See also Rodriguez v. Peters*, 63 F.3d 546, 567-68 (7th Cir. 1995) (holding that the Eighth Amendment does not require the sentencer to consider mitigation before sentencing a juvenile to life in prison for murder because the Eighth Amendment individualized-sentencing requirement applies only in cases involving the death penalty). Here, Miller was not eligible for and did not receive a sentence of death. Therefore, the individualized-sentencing requirement of the Eighth Amendment is inapplicable, *Harmelin*, 501 U.S. at 995-96, and this issue does not entitle Miller to any relief.

III.

Miller next argues that the circuit court's verdict form contained erroneous instructions that likely confused the jury and coerced his capital-murder conviction. He also argues that the circuit court's supplemental jury instruction after the jury returned inconsistent verdicts improperly coerced a capital-murder conviction. These arguments do not entitle Miller to any relief.

To the extent Miller argues that the verdict form contained erroneous instructions, this argument is not [28] preserved for review. At trial, Miller failed to object to the verdict form and did not argue that the instructions on the form were erroneous. Because Miller "'did not object to the verdict form at trial . . . , this issue was . . . not preserved for appellate review.'"

Doan v. State, 834 So.2d 823, 826 (Ala. Crim. App. 2001) (quoting *Howell v. State*, 659 So.2d 132, 134 (Ala. Crim. App. 1994), citing in turn *Cotton v. State*, 639 So.2d 577, 581 (Ala. Crim. App. 1993)). Therefore this issue does not entitle Miller to any relief.

Miller next argues that the circuit court's supplemental jury instruction after the jury returned inconsistent verdicts improperly coerced a capital-murder conviction. This issue is likewise not properly before this Court.

At the conclusion of the trial, the jury returned the verdict form. The form indicated that the jury found Miller guilty of the capital offense of murder committed during an arson as charged in count II. The form also indicated that the jury found Miller guilty of the lesser-included offense of felony murder relating to count I. The circuit court then instructed the jury that it could not find Miller guilty of both capital murder and felony murder. According to Miller, [29] during its instruction, the circuit court coerced the jury into finding him guilty of capital murder as charged in count II.

After the circuit court gave the jury the supplemental instruction, Miller moved the circuit court for a mistrial on the ground that the verdicts were inconsistent. He also objected to the circuit court's instruction on the ground that the instruction "went beyond an admonition . . . to go back and deliberate further

but went beyond the permissible charge or permissible bounds."[6] (R. 1390.) Miller did not object on the ground that the instruction was impermissibly coercive; instead, he objected to allowing the jury to deliberate further. It is well settled that "'to preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.'" *Smith v. State,* [Ms. CR-08-0369, Feb. 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010) (quoting *Merchant v. State,* 724 So. 2d 65 (Ala. Crim. App. 1998)). [30] "'"The statement of specific grounds of objection waives all grounds not specified and the trial court will not be put in error on grounds not assigned at trial."'" *Smith,* ___ So. 3d at ___ (quoting *May v. State,* 710 So. 2d 1362 (Ala. Crim. App. 1997), quoting in turn *Jackson v. State,* 593 So. 2d 167 (Ala. Crim. App. 1991)). Because Miller did not include improper coercion in his motion for a mistrial or in his objection, this argument is not preserved for this Court's review. *C.f. Doan,* 834 So. 2d at 826. Therefore, this issue does not entitle Miller to any relief.

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[6] The State argues that this Court should remand the cause with instructions for the circuit court to reinstate the jury's original verdict. The State, however, did not file a petition for a writ of mandamus directed to the circuit court or file a notice of appeal. Therefore, this argument is not properly before this Court.

IV.

Miller next argues that his statements to law-enforcement officers should have been suppressed. Specifically, Miller raises the following arguments relating to his statements: 1) the circuit court erred by failing to conduct a pretrial hearing on his motion to suppress; 2) his statement to Investigator Sandlin should have been suppressed because the State failed to meet its burden of establishing voluntariness and the *Miranda*[7] predicate; 3) his statements to Deputy Tim McWhorter were taken in violation of his Sixth Amendment right [31] to counsel; and 4) one of his statements should have been suppressed because the State failed to disclose the statement before trial. As discussed below, each of these arguments is unpreserved or without merit.

A.

Miller first argues that the circuit court erred by failing to hold a hearing on his motion to suppress before trial. Within this argument, Miller asserts that: 1) the failure to hold a hearing before trial violated Rule 15.4, Ala. R. Crim. P.; 2) failing to hold a hearing before trial allowed the State to use Miller's statements during its opening statement without there first being an admissibility determination; 3) Miller was given no notice of the suppression hearing as requested by counsel and the lack of notice

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[7] *Miranda v. Arizona*, 384 U.S. 436 (1966).

resulted in Miller not presenting the testimony of Dr. John Goff; 4) the circuit court improperly refused to consider Dr. Goff's testimony; and 5) the circuit court improperly considered a report prepared by Dr. Jerry Gragg because that report was not admitted into evidence, was hearsay, and violated Miller's right to confront Dr. Gragg.

[32] None of these arguments are preserved for this Court's review. Before trial, Miller filed a motion to suppress the three statements he gave to law-enforcement officers on the grounds that they were obtained illegally and in violation of Miller's constitutional rights. Miller also requested that his suppression motion be heard before trial. (Supp. R. 33.)

After the jury had been struck, but before it was impaneled, defense counsel reminded the circuit court that Miller had an outstanding motion to suppress his statements to law-enforcement officers. The State suggested, and the circuit court agreed, that the motion would be taken up during the trial but before the admission of the statements. Defense counsel agreed to this procedure and requested "advance notice . . . because [they] might want to put on a couple of witnesses." Defense counsel then expressed some concern that the State intended to use the statements in its opening statement and that the use of the statement in the opening statement "might be a problem if it's later suppressed." (R. 515.) The circuit court explained that they would discuss the matter further after the jury was impaneled. The circuit [33] court impaneled the jury, gave the jurors

some preliminary instructions, and allowed the jurors to go home for the day.

After the jurors left, the circuit court took up the State's use of Miller's statements in its opening statement. At that point, defense counsel expressed concern that by allowing the State to use Miller's statements during opening statement, he might be waiving his right to challenge the admissibility of the statements later. Defense counsel then sought and received a continuing objection to the admission of the statements in order to avoid any argument that he had waived his right to object to the admission of the statements. (R. 529.) Defense counsel agreed that because they had a continuing objection to the admission of the statements, they would not interrupt the State's opening statement to object when the statements were referenced. (R. 531.)

During Investigator Sandlin's testimony and before the admission of Miller's statement, the circuit court held a hearing on Miller's motion to suppress, during which Investigator Sandlin and Miller testified. After the hearing, the circuit court determined that Miller's statement had been voluntarily given. (R. 693.) Defense counsel requested that [34] the circuit court conditionally admit the statement or, more specifically, that it allow Miller to renew his motion to suppress after Dr. Goff, who was not at the hearing, testified. The circuit court expressed some concern over defense counsels' proposed procedure. Specifically, the circuit court stated that it believed that the majority of Dr. Goff's testimony would go to the

weight of the statement, not its admissibility. The circuit court then instructed counsel that, "I'll give a proper instruction as to [the weight of the statement;] you can present other matters surrounding the taking of the statement that will deal with [its] admissibility or not where that's appropriate." (R. 691-92.)

In his defense, Miller presented the testimony of Dr. Goff, who testified, among other things, that in his opinion Miller did not understand his *Miranda* rights. After Miller rested, defense counsel renewed the "motion to exclude the statements given by Evan Miller in light of Dr. Goff's testimony that he could not have formed the ability, did not understand the rights he reportedly waived intelligently and knowingly." (R. 1216.) The circuit court denied Miller's motion. Specifically, the circuit court stated that the [35] motion was "denied for the reasons stated previous[ly] [i.e., based on the totality of the circumstances, the statement was voluntarily given (R. 693), and] the confession [was] appropriately . . . admitted." The circuit court further stated that, "[i]t's for the jury to determine what to do with it, the weight they will attach to it." (R. 1216.)

To the extent Miller asserts that: 1) the failure to hold a hearing before trial violated Rule 15.4, Ala. R. Crim. P.; 2) the failure to hold a pretrial hearing allowed the State to use Miller's statements during their opening statement without there being a determination as to the admissibility of those statements; 3) Miller did not receive advance notice of the suppression hearing as requested by counsel and the lack

of notice resulted in Miller not presenting the testimony of Dr. John Goff; and 4) the circuit court improperly considered a report prepared by Dr. Jerry Gragg; Miller either failed to raise these arguments or agreed to the circuit court's procedure. For instance, although Miller moved the circuit court for a pretrial suppression hearing, he agreed to the proposed procedure of holding the hearing during trial, and never argued that such procedure violated Rule 15.4, Ala. R. [36] Crim. P. Further, Miller acquiesced in the State's use of his statement during opening argument so long as he did not waive his right to challenge the admissibility of the statement later in the trial. Miller did not assert that he lacked notice of the suppression hearing or that he was incapable of producing witnesses because of a lack of notice. Finally, Miller raised no objection to the circuit court's consideration of Dr. Gragg's report.

Because Miller agreed to the procedure used by the circuit court and failed to raise at trial the arguments he now raises on appeal, he failed to preserve these issues for appellate review. *See Shouldis v. State,* 953 So. 2d 1275, 1284 (Ala. Crim. App. 2006) (holding that to preserve an alleged error, "a timely objection must be made . . . , specific grounds for the objection should be stated, and a ruling on the objection must be made by the trial court"); *Harris v. State,* 563 So. 2d 9, 11 (Ala. Crim. App. 1989) (defendant must first obtain an adverse ruling in order to preserve an issue for appellate review); *Jordan v. State,* 574 So. 2d 1024, 1025 (Ala. Crim. App. 1990)

(claim was not preserved for appellate review where defendant did not first present his argument to [37] the trial court). Therefore, these issues do not entitle Miller to any relief.

To the extent Miller argues that the circuit court violated his constitutional rights by refusing to consider Dr. Goff's testimony in ruling on the admissibility of his statement, this argument is both unpreserved and unsupported by the record. At the close of Miller's case, he renewed his motion to suppress his statement "in light of Dr. Goff's testimony that [Miller] could not have formed the ability [and] did not understand the rights he reportedly waived. . . ." The circuit court denied the motion. At that point, Miller did not object to the circuit court's alleged refusal to consider Dr. Goff's testimony. *See Foster v. State,* 705 So. 2d 534, 542 (Ala. Crim. App. 1997) (holding that to preserve an alleged due-process violation for appellate review, an objection must be raised at the time of the alleged violation). Because Miller did not object to the circuit court's alleged refusal to consider Dr. Goff's testimony after Dr. Goff testified, this issue is not preserved for this Court's review.

[38] Moreover, even if Miller's argument was properly before this Court, it is not supported by the record. As detailed above, the circuit court initially expressed concern that Dr. Goff's testimony would go only to the weight of the statement; however, he informed counsel that "you can present other matters surrounding the taking of the statement that will deal with [its] admissibility or not where that's

appropriate." At the conclusion of Miller's case, defense counsel renewed the motion to suppress "in light of Dr. Goff's testimony that [Miller] could not have formed the ability [and] did not understand the rights he reportedly waived intelligently and knowingly." The circuit court denied Miller's motion. Specifically, the circuit court stated that the motion is "denied for the reasons stated previous[ly], the confession [was] appropriately . . . admitted." (R. 1216.)

The record regarding what the circuit court considered is ambiguous at best and fails to establish that the circuit court refused to consider Dr. Goff's testimony.[8] *See Klein v. Harris*, 268 Ala. 540, 544, 108 So. 2d 425, 428 (Ala. 1958) [39] (holding that appellate courts "construe the record, when ambiguous, to support the judgment"). Because the record does not establish that the circuit court refused to consider Dr. Goff's testimony as it related to the admissibility of Miller's statement, this issue does not entitle Miller to any relief.

B.

Miller next argues that his statement to Investigator Sandlin should have been suppressed because the State presented insufficient evidence to show

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[8] Had Miller objected to the circuit court's alleged refusal to consider Dr. Goff's testimony when he renewed his motion to suppress, the record might disclose whether Dr. Goff's testimony was in fact considered.

voluntariness and the *Miranda* predicate.[9] This argument is without merit.

"It has long been the law that a confession is prima facie involuntary and inadmissible, and that before a confession may be admitted into evidence, the burden is upon the State to establish voluntariness and a *Miranda* predicate." *Waldrop v. State,* 859 So. 2d 1138, 1155 (Ala. Crim. App. 2000) (citing *Jackson v. State,* 562 So. 2d 1373, 1380 (Ala. Crim. App. 1990)). "The trial court's finding that a statement was voluntary need only be supported by a preponderance of the [40] evidence." *Ex parte Jackson,* 836 So. 2d 979, 982 (Ala. 2002) (citing *Dixon v. State,* 588 So. 2d 903 (Ala. 1991)). "'Whether a waiver is voluntary, knowing, and intelligent depends on the particular facts and underlying circumstances of each case, including the background, experience, and conduct of the accused – i.e., the totality of the circumstances.'" *Waldrop,* 859 So. 2d at 1156 (quoting *Click v. State,* 695 So. 2d 209, 218 (Ala. Crim. App. 1996)); *see also Ex parte Matthews,* 601 So. 2d 52, 54 (Ala. 1992) (holding that a court must analyze the voluntariness of a confession by examining the totality of the circumstances).

At trial, Investigator Sandlin testified that he had obtained information that Miller had some trading cards that belonged to Cannon. He went to Miller's trailer, and Miller's mother invited him inside. At

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[9] This argument is presented in Section IV(C) of Miller's brief.

that point, Miller's mother handed him a box containing Cannon's trading cards. Investigator Sandlin then asked Miller's mother and Miller to come to the sheriff's office to give a statement. They agreed and rode with Investigator Sandlin to the sheriff's office.

Once at the sheriff's office, Investigator Sandlin informed Miller of his juvenile *Miranda* rights. [41] Specifically, Investigator Sandlin read Miller the juvenile *Miranda* rights form, which stated:

> "Before I ask any questions you must understand your rights. You have a right to remain silent. Anything you say can be used against you in a court of law. You have a right to speak with a lawyer for advice before I ask you any question, have them with you during questioning if you wish. If you cannot afford a lawyer, one will be appointed for you without charge before any questioning if you wish. If your lawyer, parents or guardian is not present you have the right to communicate with them and if necessary reasonable means will be provided for you to do so. If you decide to answer questions now without a lawyer present, you still have the right to stop answering at any time. You also have the right to stop answering any time until you have spoke[n] to a lawyer."

(R. 637, C.R. 8.)[10] Miller signed the waiver-of-rights form, and his mother signed it as a witness. According

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[10] Miller, his mother, and two probation officers were present when Miller was read his rights.

to Investigator Sandlin, Miller appeared to understand his rights, and Miller orally stated that he understood his rights. Investigator Sandlin also informed the court that Miller was not offered any reward or hope of reward in return for making a statement. Further, Miller signed the waiver-of-rights form acknowledging that he had "read or had [had] read to [him] and [had] had explained to [him], the [juvenile [42] *Miranda* rights] and [he] fully underst[oo]d what [his] rights are. [He] underst[oo]d and kn[e]w what [he was] doing. No promises or threats [were] made to [him] and no pressure or coercion of any kind [was] used against [him]." (C.R. 8.) Finally, Miller's waiver of his rights and his assertion regarding his understanding of his rights were witnessed by his mother.

According to Investigator Sandlin, after waiving his rights, Miller gave a statement in which he admitted stealing trading cards, stealing money, and assaulting Cannon. Investigator Sandlin then wrote down what Miller had told him. Miller then signed the written statement.

During the suppression hearing, Miller testified that he did not understand his juvenile *Miranda* rights. Specifically, Miller stated that he did not understand what the right to remain silent meant. He also testified that he did not understand what the right to an attorney meant. Miller admitted that he had completed the seventh grade in regular classes and that he could read and write. On cross-examination, when asked "[w]hat part of having the right to be silent do you not understand," Miller

responded that he [43] "[j]ust didn't pay attention to it." (R. 680.) Miller gave a similar response when asked about his right to an attorney.

Later, Dr. John Goff testified that he administered a test to Miller that was designed to determine a person's ability to understand his *Miranda* rights. According to Dr. Goff, Miller's responses on the test indicated that he did not understand his right to remain silent or his right to an attorney. On cross-examination, Dr. Goff testified that the test he administered to determine whether Miller understood his rights did not encompass the language used in the juvenile *Miranda* rights form.

Based on the conflicting evidence presented, the circuit court determined that Miller's statement was voluntary and admissible. "[A] trial court's ruling based upon conflicting evidence given at a suppression hearing is binding on this Court, and is not to be reversed absent a clear abuse of discretion." *Jones v. State,* 946 So. 2d 903, 919 (Ala. Crim. App. 2006) (citations and quotations omitted). "'"A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his [44] decision."'" *Hodges v. State,* 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005) (quoting *State v. Jude,* 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn *Dowdy v. Gilbert Eng'g Co.,* 372 So. 2d 11, 12 (Ala. 1979), quoting in turn *Premium Service Corp. v. Sperry & Hutchinson, Co.,* 511 F.2d 225 (9th Cir. 1975)). Here, the circuit court's determination

was supported by the testimony of Investigator Sandlin that Miller was read his rights, that he appeared to understand his rights, and that he stated he understood his rights. Therefore, this Court cannot conclude that the circuit court's determination constituted an abuse of discretion. *See D.M.M. v. State*, 647 So. 2d 57, 60 (Ala. Crim. App. 1994) (holding that "based on the conflicting evidence of voluntariness presented in the record, we find that the juvenile court judge did not abuse her discretion in determining that the appellant's statements were voluntary and admissible"). Therefore, this issue does not entitle Miller to any relief.

C.

Miller next argues that the circuit court erroneously allowed the State to admit into evidence two statements he [45] made to Deputy McWhorter because those statements were obtained in violation of his Sixth Amendment right to counsel. Specifically, Miller argues that, after his Sixth Amendment right to counsel had attached, the State induced him to make inculpatory statements by having Deputy McWhorter transport him to two mental-health evaluations. According to Miller, Deputy McWhorter was a school-resource officer at Miller's school, and Miller "had a particular rapport with McWhorter." (Miller's brief, at 44). Miller then asserts that by having Deputy McWhorter transport him, the State intentionally created a situation likely to produce a statement, in violation of his Sixth Amendment right to counsel.

This issue, however, is not preserved for this Court's review.

During the suppression hearing relating to Miller's statements to Deputy McWhorter, defense counsel argued that the statements were involuntary because of Miller's alleged inability to understand his *Miranda* rights (reasserting the arguments regarding the suppression of the statement made to Investigator Sandlin). Counsel also objected to the admission of any statements made to a therapist. Miller, however, did [46] not argue that the statements he made to Deputy McWhorter violated his Sixth Amendment right to counsel.

As this Court has repeatedly held, "'to preserve an issue for appellate review, it must be presented to the trial court by a timely and specific motion setting out the specific grounds in support thereof.'" *Smith v. State*, [Ms. CR-08-0369, Feb. 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010) (quoting *Merchant v. State*, 724 So. 2d 65 (Ala. Crim. App. 1998)). "'"The statement of specific grounds of objection waives all grounds not specified and the trial court will not be put in error on grounds not assigned at trial."'" *Smith*, ___ So. 3d at ___ (quoting *May v. State*, 710 So. 2d 1362 (Ala. Crim. App. 1997), quoting in turn *Jackson v. State*, 593 So. 2d 167 (Ala. Crim. App. 1991)). Because Miller does not argue that his statements to Deputy McWhorter were taken in violation of his Sixth Amendment right to counsel, this argument is not preserved for this Court's review and does not entitle Miller to any relief.

D.

Miller next argues that the circuit court erred in denying his motion to suppress an oral statement he made to [47] Investigator Sandlin relating to his possession of the trading cards. (C.R. 10, State's Exhib. 10.) In this oral statement, Miller informed Investigator Sandlin that he had thrown some of Cannon's trading cards away. Miller contends that this oral statement should have been suppressed because it was not disclosed to defense counsel, in violation of Rule 16, Ala. R.Crim. P., and in violation of the circuit court's discovery order.

At trial, Investigator Sandlin described going to Miller's trailer to get Cannon's trading cards from Miller's mother. Investigator Sandlin was then asked whether Miller made any statement relating to the cards. At that point, defense counsel objected, arguing, among other things, that defense counsel had not seen a copy of the oral statement; therefore, the State had violated the court's discovery order. The prosecutor responded that the State did, in fact, disclose the statement to defense counsel. The State asserted that it created a list of items that had been disclosed to the defense and that the oral statement was on that list. The State further asserted that the list was signed by defense counsel.

[48] After weighing the conflicting statements of counsel, the circuit court denied Miller's motion. Faced with conflicting statements, this Court cannot say that the circuit court abused its discretion in

overruling Miller's motion. *Cf. D.M.M. v. State,* 647 So. 2d at 60 (Ala. Crim. App. 1994) (holding that "based on the conflicting evidence of voluntariness presented in the record, we find that the juvenile court judge did not abuse her discretion in determining that the appellant's statements were voluntary and admissible"). Therefore, this issue does not entitle Miller to any relief.

Moreover, even if the admission of Miller's oral statement was an error, that error would be harmless beyond a reasonable doubt. Rule 45, Ala. R. App. P. This Court has repeatedly held that "'[t]he erroneous admission of evidence that is merely cumulative is harmless error.'" *Gobble v. State,* [Ms. CR-05-0225, Feb. 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010) (quoting *Dawson v. State,* 675 So. 2d 897, 900 (Ala. Crim. App. 1995)). In his oral statement, Miller informed Investigator Sandlin that the trading cards "were the cards that [Miller] didn't throw away." (C.R. 10.) [49] This statement, at most, helped to link Miller to the stolen cards. However, Miller's connection to the cards was also established by his formal statement to Investigator Sandlin in which he admitted stealing the cards. Because the oral statement was cumulative, any error in its admission was harmless. *Gobble,* ___ So. 3d at ___. Therefore, this issue does not entitle Miller to any relief.

V.

Miller next argues that he was erroneously prevented from eliciting testimony regarding his mental state. Specifically, Miller asserts that the circuit court erred in preventing him from questioning Colby Smith about his mental state on the night of the murder. He also argues that the circuit court erroneously prevented Dr. John Goff from testifying as to whether Miller was capable of forming intent.

At trial, defense counsel asked Colby Smith if, in Smith's opinion, Miller was "thinking clearly" the night of the murder. The prosecutor objected on the ground that Smith cannot testify "as to whether or not what [Miller] was thinking." (R. 1033.) The circuit court sustained the prosecutor's objection. At that point, defense counsel asked [50] his next question without making any offer of proof regarding what Smith's answer would have been had the objection not been sustained.

Later, defense counsel asked Dr. Goff the following question: "[D]oes [Miller] have the ability to form intent?" The prosecutor objected to the question, and the circuit court sustained the objection. Defense counsel then, without making any offer of proof, withdrew the question. (R. 1200.)

Rule 103(a), Ala. R. Evid., provides that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent

from the context within which questions were asked." The Alabama Supreme Court has explained that "[w]hen the trial court sustains an objection to a question that does not on its face show the expected answer, a party must make an offer of proof and explain the relevancy of the expected answer to preserve error for appellate review." *Ensor v. Wilson*, 519 So. 2d 1244, 1262 (Ala. 1987) (citing *Bessemer Executive Aviation, Inc. v. Barnett*, 469 So. 2d 1283 (Ala. 1985)). "[I]n the absence of an offer of proof [51] [regarding a witness's expected answer], [appellate courts] cannot review [the exclusion of testimony]. To attempt to do so would necessitate impermissible speculation by this Court." *Burkett v. American Gen. Fin., Inc.*, 607 So. 2d 138, 140 (Ala. 1992) (citing *Ensor*, 519 So. 2d at 1262, and C. Gamble, *McElroy's Alabama Evidence* § 425.01(4) (4th ed. 1991)).

Here, defense counsel failed to proffer what answers Smith and Dr. Goff would have given if the prosecutor's objection had not been sustained. In fact, he withdrew the question to Dr. Goff. Because defense counsel did not proffer what the witnesses' testimony would have been, this Court cannot determine that the exclusion of the testimony affected a "substantial right" or was prejudicial. Rule 103(a), Ala. R. Evid. Accordingly, Miller failed to preserve this issue for appellate review. *See Perry v. State*, 568 So. 2d 873, 874-75 (Ala. Crim. App. 1990) ("[B]ecause [the appellant failed] to make an offer of proof as to the expected testimony of the witness, this issue is not

preserved for review."). Therefore, this issue does not entitle Miller to any relief.

[52] VI.

Miller next argues that the circuit court erroneously allowed "an unqualified witness to offer important testimony concerning physical evidence in the case." (Miller's brief, at p. 55.) He argues that the circuit court erred in permitting Nancie Jones, the head of the DNA section of the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences, to testify that the blood spatter on the front of Miller's shirt was consistent with Cannon having been struck with an object such as a bat. According to Miller, the State failed to establish that Jones is a expert in blood-spatter analysis; therefore, this testimony should have been excluded.

Assuming, without deciding, that the State failed to present sufficient evidence to establish that Jones is an expert in blood-spatter analysis, any error in allowing her testimony regarding what could have caused the blood spatter on Miller's shirt was harmless beyond a reasonable doubt. *See* Rule 45, Ala. R. App. P. It is well settled that "'[t]estimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to [53] the same effect or from which the same facts can be inferred.'" *Gobble v. State*, [Ms. CR-05-0225, Feb. 5, 2010] ___ So. 3d ___, ___ (Ala. Crim. App. 2010) (quoting *Yeomans v. State*, 641 So. 2d 1269, 1272 (Ala.

Crim. App. 1993)). That is, "'[t]he erroneous admission of evidence that is merely cumulative is harmless error.'" *Gobble*, ___ So. 3d at ___ (quoting *Dawson v. State*, 675 So. 2d 897, 900 (Ala. Crim. App. 1995)).

At trial, the State presented testimony that after Miller attempted to steal Cannon's wallet, Miller and Cannon struggled with one another. During the struggle, Miller hit Cannon multiple times with his fist, and Smith hit Cannon on the head with a bat. During this time, Miller also hit Cannon with the bat. The State also presented evidence indicating that the shirt Miller was wearing on the night of Cannon's murder had blood spatter on it. DNA testing of the spatter indicated that the blood was consistent with Cannon's. Finally, law-enforcement officers recovered an aluminum bat from the scene that had bloodstains on it.

From the evidence establishing that Cannon was hit on the head with a bat while he was struggling with Miller, it is [54] reasonable to infer that the blood spatter on Miller's shirt was the result of Cannon being hit with an object, i.e., the bat or Miller's fists. Therefore, Jones's testimony that the blood spatter on the shirt was caused by Cannon being hit with an object was cumulative. *See Gobble*, ___ So. 3d at ___ (quoting *Yeomans*, 641 So. 2d at 1272) (holding that "'[t]estimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred'"). Consequently, any error in the admission of Jones's testimony was harmless

and does not entitle Miller to any relief. Rule 45, Ala. R. App. P.

VII.

Miller next argues that the circuit court erred in failing to give two jury instructions. Specifically, Miller asserts that the circuit court erroneously failed to instruct the jury on lesser-included offenses. He also contends that the circuit court erroneously refused to instruct the jury regarding a witness's possible motives for testifying.

A.

[55] Miller first argues that the circuit court erred in refusing to give his requested jury instructions on the lesser-included offenses of "intentional murder, extreme indifference murder, and manslaughter with provocation." (Miller's brief, at p. 58-59). Although Miller submitted his requested jury instructions in writing before trial, he did not object when the circuit court failed to give the requested instructions.

> "No party may assign as error the court's . . . failing to give [an] instruction . . . unless the party objects thereto before the jury retires to consider its verdict, stating the matter to which he or she objects and the grounds of the objection."

Rule 21.3, Ala. R. Crim. P. Because Miller did not object when the circuit court failed to instruct the jury on lesser-included offenses, he did not preserve

this argument for appellate review. *See* Rule 21.3, Ala. R. Crim. P.; *Bullock v. State*, 697 So. 2d 66 (Ala. Crim. App. 1997); *see also Goins v. State*, 521 So. 2d 97, 98 (Ala. Crim. App. 1987). Therefore, this issue does not entitle him to any relief.

B.

Miller next argues that the circuit court erroneously refused to instruct the jury that it could consider a [56] witness's motivation for gain in evaluating the credibility of that witness's testimony. At the conclusion of the circuit court's jury instructions, Miller asked the circuit court to "charge the jury on the consideration they can give to anyone's motive for gain to testify." (R. 1382-83.) The circuit court ruled that the requested instruction was covered by the instruction he gave on witnesses' possible biases.

"A trial court has broad discretion when formulating its jury instructions . . . ." *Williams v. State*, 795 So. 2d 753, 780 (Ala. Crim. App. 1999) (citing *Williams v. State*, 710 So. 2d 1276, 1305 (Ala. Crim. App. 1996)). "When reviewing a trial court's jury instructions, [this Court] must view [the instructions] as a whole, not in bits and pieces, and as a reasonable juror would have interpreted them." *Johnson v. State*, 820 So. 2d 842, 874 (Ala. Crim. App. 2000).

> "Although . . . [a] defendant is entitled to have the trial court instruct the jury on his theory of defense, it is . . . well established that [t]he trial judge may refuse to give a

> requested jury charge when the charge is either fairly and substantially covered by the trial judge's oral charge or is confusing, misleading, ungrammatical, not predicated on a consideration of the evidence, argumentative, abstract, or a misstatement of the law."

[57] *Reeves v. State*, 807 So. 2d 18, 41 (Ala. Crim. App. 2000) (citations and quotations omitted). *See also Riley v. State*, 875 So. 2d 352, 358 (Ala. Crim. App. 2003) (holding that "the trial judge properly refused the charge because the charge was substantially covered by the trial judge's oral charge").

Here, the circuit court instructed the jury that, in weighing the credibility of witnesses, it could consider any witness's possible bias. "[A] reasonable juror would have interpreted," *Johnson*, 820 So. 2d at 874, the circuit court's instruction to cover motivation for testifying. *See Black's Law Dictionary*, 171 (8th ed. 2004) (defining bias as, among other things, an "inclination"). Because Miller's requested instruction was substantially covered by the circuit court's instruction, the circuit court did not abuse its discretion by refusing it. Therefore, this issue does not entitle Miller to any relief.

VIII.

Miller next argues that, during closing argument, the prosecutor misled the jury regarding the law of intent as it related to count I of the indictment, the capital offense of murder during a robbery. He further argues that, during his [58] rebuttal closing argument,

the prosecutor improperly equated Miller's lack-of-intent argument with an insanity defense, thereby shifting the burden to Miller to disprove intent. The arguments are without merit.

A.

To the extent Miller argues that the prosecutor misled the jury on the element of intent regarding count I charging Miller with murder made capital because it was committed during the course of a robbery, this argument is moot. The portion of the prosecutor's argument that Miller argues misstates the law of intent was as follows:

> "The charge which I read to you back when we started this case, *first charge* being capital murder during the *course of a robbery*. That's what the State is required to prove to you for [you] to find the verdict of guilty as to that charge. One is that the defendant caused the death of Cole Cannon. And the second element would be that it was during the course of a theft of property and that force was used during that theft, that makes it a robbery. You have a murder during the course of a robbery while the defendant was armed with a deadly weapon, in this case a baseball bat. The force used can also be the hitting of the bat and also be used in the escaping with the property, not just in the taking of the property."

(R. 1269-1270; emphasis added.) According to Miller, because the prosecutor failed to mention intent as an

element, his [59] conviction must be reversed. However, the jury acquitted Miller of capital murder/robbery. Miller's "acquittal on the [count I] renders this issue moot. 'Only the count upon which appellant was found guilty is subject to appellate review.'" *Snell v. State*, 677 So. 2d 786, 791 (Ala. Cr. App. 1995) (quoting *DeFries v. State*, 597 So. 2d 742, 744 (Ala. Crim. App. 1992), quoting in turn *Hammond v. State*, 354 So. 2d 280, 284 (Ala. Crim. App. 1977)). *See also Inmon v. State*, 585 So. 2d 261, 264 (Ala. Crim. App. 1991) (holding that an appellant's challenge to the sufficiency of the indictment relating to a charge in the indictment was moot because the jury had acquitted him of that charge). Because Miller's challenge to the prosecutor's argument relating to count I was made moot by his acquittal on that count, this issue is not properly before this Court. Accordingly, this issue does not entitle Miller to any relief.

To the extent Miller argues that the prosecutor misled the jury on the element of intent regarding count II charging Miller with murder made capital because it was committed during the course of an arson, this argument is not preserved for appellate review and is without merit. It is well settled [60] that "[w]hen no objection is made following a prosecutor's allegedly improper remark, a claim of error based on improper argument of counsel is not preserved for appellate review." *May v. State*, 710 So. 2d 1362, 1373 (Ala. Crim. App. 1997) (citing *Lee v. State*, 562 So. 2d 657 (Ala. Crim. App. 1989)). *See also Buford v. State*, 891 So. 2d 423, 434 (Ala. Crim. App. 2004) (holding

that the appellant failed to preserve his challenge to the prosecutor's comment because he failed to object at trial). After the prosecutor gave his "synopsis" of the elements of murder made capital because it was committed during the course of an arson, Miller's counsel did not raise any objections. (R. 1271.) Because Miller failed to preserve this issue, it "is not properly before this Court for appellate review." *Dickey v. State*, 901 So. 2d 750, 755 (Ala. Crim. App. 2004).

Even if this issue was preserved for appellate review, it would not entitle Miller to any relief. "In judging a prosecutor's closing argument, the standard is whether the argument '"'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"'" *Sneed v. State*, 1 So. 3d 104, 138 (Ala. Crim. App. 2007) (quoting [61] *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), quoting in turn *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Before the prosecutor's "synopsis" of what the State had to prove to establish murder during the course of an arson, the circuit court informed the jury that the court would "give [it] all of the elements of the offenses, capital offenses, . . . at the conclusion of argument by both sides." (R. 1270-71.) Later, after closing arguments, the circuit court correctly instructed the jury on each of the elements of murder during the course of an arson. (R. 1344-47.) The circuit court then instructed the jury that if it found that the State "failed to prove beyond a reasonable doubt any one or more of the elements of this offense

of intentional murder during [an] arson . . . , then you cannot find the defendant guilty of this capital offense." (R. 1347.) *See Frazier v. State*, 758 So. 2d 577, 604 (Ala. Crim. App. 1999) ("The jury is presumed to follow the instructions given by the trial court.") (quoting *Hutcherson v. State*, 727 So. 2d 846, 854 (Ala. Crim. App. 1997), citing in turn *Taylor v. State*, 666 So. 2d 36, 70 (Ala. Crim. App. 1994)).

[62] Because the jury was aware that the prosecutor merely gave a synopsis of what the State was required to prove, because the circuit court informed the jury that it would instruct the jury on all of the elements of the capital offenses, and because the circuit court did in fact properly instruct the jury on all of the elements of the capital offenses, this Court cannot say that the prosecutor's statement "'"so infected the trial with unfairness as to make the resulting conviction a denial of due process."'" *Sneed*, 1 So. 3d at 138 (quoting *Darden*, 477 U.S. at 181, quoting in turn *Donnelly*, 416 U.S. at 643). Therefore, this issue does not entitle Miller to any relief.

B.

Miller's argument that the prosecutor improperly equated Miller's lack-of-intent argument with an insanity defense, thereby shifting the burden to Miller to disprove intent, is not preserved for appellate review. At trial, Miller failed to object to the comment that he now asserts improperly equated intent with an insanity defense. It is well settled that "[w]hen no objection is made following a prosecutor's allegedly

improper remark, a claim of error based on improper [63] argument of counsel is not preserved for appellate review." *May v. State*, 710 So. 2d 1362, 1373 (Ala. Crim. App. 1997) (citing *Lee v. State*, 562 So. 2d 657 (Ala. Crim. App. 1989)). *See also Buford v. State*, 891 So. 2d 423, 434 (Ala. Crim. App. 2004) (holding that the appellant failed to preserve his challenge to the prosecutors comment because he failed to object at trial). Because Miller failed to preserve this issue, it "is not properly before this Court for appellate review." *Dickey v. State*, 901 So. 2d 750, 755 (Ala. Crim. App. 2004). Therefore, Miller is not entitled to any relief.

IX.

Miller next argues that the circuit court erred in repeatedly informing the jury about his possible punishments. Specifically, he contends that the circuit court's instructions were "highly prejudicial" and "inject[ed] [irrelevant] considerations of punishment into the jury's guilt-innocence decision." (Miller's brief, at p. 66, 68.) Miller, however, did not first present this argument to the circuit court. Therefore, he did not preserve this issue for appellate review. *See Harris v. State*, 563 So. 2d 9, 11 (Ala. Crim. App. 1989) (defendant must first obtain an adverse ruling [64] in order to preserve an issue for appellate review); *Jordan v. State*, 574 So. 2d 1024, 1025 (Ala. Crim. App. 1990) (claim was not preserved for appellate review where defendant did not first present his argument to the trial court). Consequently, this issue does not entitle Miller to any relief.

X.

Miller next argues that the circuit court erroneously denied his motion for discovery of transcripts of the grand-jury proceedings. In his motion, and during the hearing on the motion, Miller offered nothing more than bare assertions that a transcript of the grand-jury proceedings might contain impeachment testimony.

"Alabama has long protected the secrecy of grand-jury proceedings." *Blackmon v. State*, 7 So. 3d 397, 409 (Ala. Crim. App. 2005) (citing § 12-16-214, Ala. Code 1975). "However, a defendant may be allowed to inspect grand-jury proceedings if the defendant meets the threshold test of showing a 'particularized need' for breaching the secrecy of those proceedings." *Blackmon*, 7 So. 3d at 409. The Alabama Supreme Court has explained that:

> "Before a defendant is allowed to inspect a transcript of a State's witness who testified before [65] the grand jury[,] . . . the defendant should at least and at a very minimum make some offer of proof (1) that the matters contained in the witness' grand jury testimony were relevant to the subject matter of the prosecution; (2) and that there exists an inconsistency between grand jury testimony and trial testimony."

McKissack v. State, 926 So. 2d 367, 370 (Ala. 2005) (citations and quotations omitted). Before a defendant may inspect grand-jury testimony, he must "show[] [a] likelihood of inconsistencies between the [State's

witness's] grand-jury testimony . . . and their trial testimony." *McKissack*, 926 So. 2d at 372. This burden is not met until the defendant has "established that there was a genuine concern that there could be inconsistencies between the grand-jury testimony and the trial testimony . . . ." *Id.* at 375 (citations and quotation omitted). Bare assertions that the grand-jury transcripts might disclose impeachment evidence is insufficient to establish a "particularized need" for discovery of these proceedings. *Billups v. State*, [Ms. CR-05-1767, Nov. 13, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009). "Unless defense counsel is merely going on a fishing expedition, he will have some information as to the particular inconsistency [66] in the defendant's testimony . . . ." *McKissack*, 926 So. 2d at 370 (Ala. 2005) (citations and quotations omitted).

Here, Miller has presented nothing more than a bare assertion that the grand-jury testimony might contain impeachment evidence. He did not attempt to establish what impeachment evidence would be discovered. Accordingly, Miller failed to meet his burden to establish a particularized need for a transcript of the grand-jury proceedings, and the circuit court did not abuse its discretion by denying his discovery motion.

XI.

Miller next argues that the trial court erred in admitting autopsy photographs, crime-scene photographs, and a video of the crime scene. Specifically,

Miller contends that these exhibits were cumulative, inflammatory, and unduly prejudicial; therefore, the trial court erred in allowing them to be admitted.

Alabama courts have long recognized that photographs depicting the crime scene and the wounds of the victims are relevant and admissible. *See Stallworth v. State*, 868 So. 2d 1128, 1151 (Ala. Crim. App. 2001) ("The courts of this state [67] have repeatedly held that photographs that accurately depict the crime scene and the nature of the victim's wounds are admissible despite the fact that they may be gruesome or cumulative." (quoting *Land v. State*, 678 So. 2d 201, 207 (Ala. Crim. App. 1995))); *Ward v. State*, 814 So. 2d 899, 906 (Ala. Crim. App. 2000) ("'The same rule applies to videotapes [that applies to] photographs . . . .'" (quoting *Siebert v. State*, 562 So. 2d 586, 599 (Ala. Crim. App. 1989))). In *Brooks v. State*, this Court explained that:

> "'Generally, photographs are admissible into evidence in a criminal prosecution "if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge."' *Bankhead v. State*, 585 So. 2d 97, 109 (Ala.Crim.App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd, 625 So. 2d 1146 (Ala. 1993), quoting *Magwood v. State*, 494 So. 2d

> 124, 141 (Ala.Crim.App. 1985), aff'd, 494 So. 2d 154 (Ala. 1986). 'Photographic exhibits are admissible even though they may be cumulative, demonstrative of undisputed facts, or gruesome.' *Williams v. State,* 506 So. 2d 368, 371 (Ala.Crim.App. 1986) (citations omitted). In addition, 'photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.' *Ex parte Siebert,* 555 So. 2d 780, 784 (Ala. 1989). 'This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's [68] injuries.' *Ferguson v. State,* 814 So. 2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So. 2d 970 (Ala. 2001). '"[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter."' *Jackson v. State,* 791 So. 2d 979, 1016 (Ala. Crim. App. 2000), quoting *Perkins v. State,* 808 So. 2d 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So. 2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953 (2002), on remand to, 851 So. 2d 453 (Ala. 2002)."

973 So. 2d 380, 393 (Ala. Crim. App. 2007).

This Court has reviewed the crime-scene photographs, the crime-scene video, and the autopsy photographs and holds that they were relevant and admissible to show the scene of the crime and the extent of the victim's injuries. Further, although unpleasant, the photographs were not unduly gruesome.

Therefore, the circuit court did not commit any error in allowing the photographs to be admitted at trial.

XII.

Miller next argues that the circuit court erred in failing to protect him from prejudicial pretrial publicity. Specifically, he contends that the circuit court should have sequestered the jury or taken other necessary steps to prevent the jury from viewing prejudicial images of him wearing shackles and handcuffs on television. (Miller's brief, at p. [69] 74-75). Miller, however, did not preserve these issues for appellate review.

The record indicates that before trial, Miller's defense counsel requested that the jury be sequestered in an effort to control pretrial publicity. Initially, the circuit court indicated that it would likely sequester the jury, but stated that the issue would be taken up later. Defense counsel did not raise the issue of sequestering the jury again and did not obtain an adverse ruling on the motion. The circuit court subsequently instructed the jury not to watch any television coverage of the trial. Later in the trial, Miller's trial counsel requested that the court repeat its instruction regarding television coverage. The circuit court agreed to give the instruction again at the end of the day but advised Miller's trial counsel that he "may want to remind [him]". (R. 695). Miller's trial counsel, however, failed to remind the court of their

agreement before the recess, and the requested instruction was never given.

Because Miller did not object to the circuit court's failure to rule on his motion to sequester the jury and did not object when the jury was not sequestered, he never [70] received an adverse ruling. Likewise, Miller did not obtain an adverse ruling when the circuit court failed to re-instruct the jury to avoid watching any television coverage of the trial. Consequently, these issues were not preserved and are not properly before this Court. *See Harris v. State,* 563 So. 2d 9, 11 (Ala. Crim. App. 1989) (defendant must first obtain an adverse ruling in order to preserve an issue for appellate review); *Birge v. State,* 973 So. 2d 1085, 1105 (Ala. Crim. App. 2007) (holding that "in order to preserve an issue for appellate review, a timely objection must be made in the trial court, and the court must enter an adverse ruling"). Therefore, Miller is not entitled to any relief.

XIII.

Miller next argues that the circuit court erred in failing to declare a mistrial or to impanel a new jury because some members of Cannon's family were wearing buttons displaying Cannon's picture during the first day of voir dire.

After noticing several individuals wearing the buttons, Miller's trial counsel informed the court of his concerns and asked that the court order that the pins be removed. After hearing from both defense

counsel and the State, the court [71] ordered that the buttons be removed while the individuals were in the presence of the venire or jury. The circuit court then stated that it would leave it up to the State to carry out its directives. At the conclusion of their discussion, Miller's trial counsel indicated that he was satisfied with the court's decision and at no time did he move for a mistrial or request a new venire. Consequently, Miller's argument that the circuit court erred in failing to grant him a mistrial or to impanel a new jury venire is not preserved for appellate review. *See Harris v. State,* 563 So. 2d 9, 11 (Ala. Crim. App. 1989) (defendant must first obtain an adverse ruling in order to preserve an issue for appellate review); *Jordan v. State,* 574 So. 2d 1024, 1025 (Ala. Crim. App. 1990) (claim was not preserved for appellate review where defendant did not first present his argument to the trial court). Therefore, Miller is not entitled to any relief.

XIV.

Miller finally argues that the circuit court erroneously prevented the defense from obtaining information about veniremembers' exposure to media coverage of the crime. Specifically, Miller asserts that the circuit court's denial [72] of his motions for a jury questionnaire and for individual voir dire prevented him from discovering the extent to which veniremembers had been exposed to media coverage of the crime.

When the circuit court denied Miller's motion for a jury questionnaire and for individualized voir dire, the circuit court explained that it would bring the veniremembers into the courtroom in panels and allow both sides to question the panels. Thereafter, the circuit court brought panels of 18 veniremembers into the courtroom for voir dire examination and provided both sides an opportunity to question the veniremembers.

It is well settled that "'the method of voir dire examination is within the discretion of the trial court and a trial court's refusal to allow the use of [a] juror questionnaire is not an abuse of that discretion.'" *Hodges v. State,* 856 So. 2d 875, 913 (Ala. Crim. App. 2001) (quoting *Ex parte Land,* 678 So. 2d 224, 242 (Ala. 1996)). Likewise, "'there is no requirement that a defendant be allowed to question each prospective juror individually during voir dire examination.'" *Sneed v. State,* 1 So. 3d 104, 135 (Ala. Crim. App. 2007) (quoting *Coral v. State,* 628 So. 2d 954, 968 (Ala. [73] Crim. App. 1992)). "'This rule applies to capital cases, and the granting of a request for individual voir dire is discretionary with the trial court.'" *Sneed,* 1 So. 3d at 135 (quoting *Coral,* 628 So. 2d at 968).

The record indicates that the circuit court did not abuse its discretion in its method of conducting voir dire examination. The circuit court allowed the veniremembers to be questioned in panels of 18, and both sides were allowed ample opportunity to question the veniremembers. Miller has failed to point to any indication in the record that he was denied a fair

opportunity to question veniremembers or that he was prevented from discovering information relating to media exposure through questioning. Accordingly, Miller has not established that the circuit court abused its discretion in the manner in which it conducted voir dire.

For the foregoing reasons, the judgment of the circuit court is affirmed.

OPINION OF JUNE 25, 2010, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED; APPLICATION FOR REHEARING IS OVERRULED.

Wise, P.J., and Welch, Kellum, and Main, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

[SEAL]

October 22, 2010

1091663

Ex parte Evan Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Evan Miller v. State of Alabama) (Lawrence Circuit Court: CC06-68; Criminal Appeals: CR-06-0741).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on October 22, 2010:

Writ Denied. No Opinion. Stuart, J. – Cobb, C.J., and Lyons, Woodall, Smith, Bolin, and Parker, JJ., concur. Murdock, J., dissents. Shaw, J., recuses himself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct

copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of October, 2010.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 7, 2011

Mr. Bryan A. Stevenson
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104

Re: Evan Miller v. Alabama
No. 10-9646

Dear Mr. Stevenson:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The case is to be argued in tandem with No. 10-9647, Jackson v. Hobbs, Dir., AR DOC."

* * *

Sincerely,

William K. Suter, Clerk

by /s/ DJ McNerney

Denise J. McNerney
Merits Cases Clerk

Enclosures

PETITIONER'S BRIEF

No. 10-9646

In The
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Alabama Court Of Criminal Appeals

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a 14-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a 14-year-old child as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported at 63 So. 3d 676 and appears in the Joint Appendix at J.A. 131-90. That opinion withdrew the court's previous opinion, substituted a new opinion, and overruled petitioner Evan Miller's application for rehearing. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals is unreported and is reproduced at J.A. 191-92.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The initial judgment of the Alabama Court of Criminal Appeals was issued on June 25, 2010. On August 27, 2010, that court overruled a timely application for rehearing, withdrew its opinion, and substituted a new opinion. The Alabama Supreme Court denied Evan's timely petition for certiorari to the Alabama Court of Criminal Appeals on October 22, 2010. On January 13, 2011, Justice Thomas extended the time for filing a petition for certiorari until March 21, 2011. The petition was filed on that date.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It bears upon the States through the Due Process Clause of the Fourteenth Amendment.

INTRODUCTORY STATEMENT

Petitioner Evan Miller's case will be heard by this Court in tandem with *Jackson v. Hobbs*, No. 10-9647. The petitioners' briefs in the two cases have been drafted with a view to sparing the Court redundant reading insofar as possible. The central constitutional arguments for both petitioners are most fully developed in the *Jackson* brief. The present brief summarily reprises those arguments and adds material specifically relevant to Evan Miller's circumstances. Counsel respectfully suggest that the briefs will be best understood if the Brief for Petitioner in *Jackson* [hereinafter "the *Jackson* brief"] is read before this one.[1]

[1] Petitioner Evan Miller incorporates all of the arguments in the *Jackson* brief except those in Part H of the *Jackson* Argument section, which are unique to the *Jackson* record.

STATEMENT OF THE CASE

A. The Course of Proceedings and Presentation of the Constitutional Issues in the Courts Below

Evan Miller was arrested in 2003 at the age of 14 and transferred to the Lawrence County, Alabama, Circuit Court (*Ex parte E.J.M.*, 928 So. 2d 1081 (Ala. 2005)), where he was indicted for two counts of capital murder of Mr. Cole Cannon. J.A. 1; C. 10-11.[2] Before trial, defense counsel moved for a declaration that Alabama's mandatory life-without-parole sentence could not constitutionally be applied to a 14-year-old charged with capital murder. J.A. 20-21. The motion was denied. J.A. 22.

Following a jury trial, Evan was convicted of capital murder in the course of an arson but acquitted of capital murder in the course of a robbery. J.A. 70, 77; C. 93. On the same day and without further proceedings, he was sentenced to life imprisonment without parole. J.A. 70-72. Counsel filed a new-trial motion arguing that a sentence of life imprisonment without the possibility of parole imposed upon a young adolescent violates the Eighth and Fourteenth Amendments (J.A. 80-87) and presenting uncontroverted evidence of the rarity of such sentences (J.A. 127-30). The motion also challenged the imposition of a mandatory life-without-parole sentence on a

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[2] "C." refers to the clerk's record in the appellate record below. "R." refers to the trial transcript.

14-year-old without consideration of his youth or other mitigating circumstances. J.A. 87-92. The Circuit Court denied the motion. J.A. 100. Evan was sent to state prison. J.A. 4, 78.

Evan's counsel appealed to the Alabama Court of Criminal Appeals, raising both a categorical challenge to the constitutionality of a life-without-parole sentence for a 14-year-old and a challenge to the imposition of a mandatory life-without-parole sentence on a child of that age. Brief of Appellant at 7-29, *Miller v. State*, No. CR-06-0741 (Ala. Crim. App. June 6, 2007). The Alabama Court of Criminal Appeals affirmed, ruling that "Miller's sentence of life in prison without the possibility of parole – the second harshest sentence – for capital murder does not violate the Eighth Amendment." J.A. 151; *Miller v. State*, 63 So. 3d 676, 691 (Ala. Crim. App. 2010). The court concluded that the seriousness of the offense of capital murder supported a life-without-parole sentence regardless of the offender's age. J.A. 148-51; *Miller*, 63 So. 3d at 689-91. It further held that Evan's challenge to the mandatory nature of his sentence was foreclosed by *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (1996); its opinion did not address the impact of his age on this aspect of the case. J.A. 151-52; *Miller*, 63 So. 3d at 691.

Evan's timely application for rehearing was denied after the court substituted a new opinion making alterations not presently relevant. J.A. 7, 190. The Alabama Supreme Court denied Evan's timely petition for certiorari. J.A. 191-92. On March 21, 2011, a

petition for certiorari was filed with this Court. On November 7, 2011, the Court granted it and directed that the case be argued in tandem with *Jackson v. Hobbs*, 10-9647. J.A. 193.

B. Evan's Background, Offense, and Arrest

Evan grew up under conditions of violent physical abuse, extreme neglect, and severe poverty. Both his parents were alcoholics and his mother was also addicted to illegal drugs. J.A. 26. The family moved so often that, at trial, his mother could not recall all the schools Evan had attended. J.A. 66-67.

Evan's father frequently beat Evan, his mother, and his siblings severely. J.A. 26, 61-63. After one such incident, Evan attempted to hang himself in order to escape his father's violence. J.A. 28, 63. Evan was five years old at this time. J.A. 63. He went on to attempt suicide five more times during his childhood. J.A. 63-64. At age six he began receiving mental health treatment (J.A. 29) and was then treated intermittently by several local mental health centers (J.A. 60). He also attempted to escape his brutalizing environment by drinking and using drugs, beginning as early as age eight. J.A. 27; *see also* J.A. 64-65.

When Evan was ten, state authorities finally responded to his father's abuse by removing Evan and his siblings from their home and placing them in foster care. J.A. 26, 61. His parents divorced at that time. J.A. 44. After he was returned to the custody of his drug-addicted mother a few years later, she

continued to fail to provide him with the most basic necessities or even minimal supervision. J.A. 33, 62-63, 67, 68; R. 1251. With no guidance or support, Evan followed his parents' models: his own drug addiction continued to escalate, ultimately leading to daily off-label ingestion of prescription medications in addition to frequent use of marijuana and crystal methamphetamines. J.A. 27.

In this environment, late at night on July 15, 2003, Evan's 52-year-old neighbor, Cole Cannon, interrupted Evan, his family, and his friend Colby Smith as they prepared to go to bed. J.A. 132; R. 710. Evan was then 14 years old; Colby Smith was 16. R. 1022. Mr. Cannon, who was visibly intoxicated (J.A. 132), made a drug deal with Evan's mother within earshot of the two boys. R. 1004. Later, when Mr. Cannon returned to his own home, the two boys accompanied him. Mr. Cannon gave them alcohol and asked the boys to go buy some marijuana with money that he provided. R. 710, 1008, 1012. The three of them smoked the marijuana and played drinking games. J.A. 132-33. Evan was highly intoxicated after consuming almost a fifth of whiskey and two Klonopin[3] pills in addition to the marijuana. J.A. 45, 138. Colby Smith testified at Evan's trial that the

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[3] Klonopin is a psychiatric drug used to treat anxiety which, when taken with alcohol, enhances alcohol's disinhibiting and judgment-impairing effects. R. 1170-73.

boys planned to steal Mr. Cannon's wallet. J.A. 132; R. 981.[4]

At some point while the boys were at Mr. Cannon's home, an altercation began. The cause of the altercation was disputed, but both boys agreed that Mr. Cannon initiated the physical aggression by grabbing Evan's throat. J.A. 133; R. 710-11, 984. Colby Smith admitted at trial that he reacted by beating Mr. Cannon in the head with a baseball bat. J.A. 133. Colby Smith testified that Evan later hit Mr. Cannon with the bat (J.A. 133), although Evan himself told police that he had hit Mr. Cannon with his fists (R. 711). Colby Smith also testified that Evan then put a sheet over his head and said, "I am God, I've come to take your life." J.A. 133. Both boys started fires in Mr. Cannon's home. J.A. 133. As they were doing so, Mr. Cannon asked Colby, "[W]hy are y'all doing this to me?" J.A. 133-34. The boys left. R. 991. Mr. Cannon died later that morning of smoke inhalation. J.A. 137.

A week later, Evan was brought to the police station and interrogated regarding Mr. Cannon's death. R. 699-701. After two hours of questioning by adults (R. 656), he signed an inculpatory statement written

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[4] In exchange for testifying against Evan, 16-year-old Colby Smith was permitted to plead guilty to felony murder and was sentenced to life *with* parole eligibility. R. 1037.

by the investigating officer (R. 773) and was then arrested (R. 714).

SUMMARY OF ARGUMENT

The constitutional logic of *Roper v. Simmons* and *Graham v. Florida* requires the invalidation of a mandatory sentence of life imprisonment without parole imposed on a 14-year-old child.

As a class, children 14 and younger are inherently characterized by internal attributes and external circumstances which preclude a finding of the degree of culpability that would make their consignment to life-long incarceration with no hope of release constitutionally permissible under Eighth Amendment excessiveness analysis. This is no less true in murder cases than in other cases of violent crimes by young teens. The Summary of Argument at pages 5-6 in the *Jackson* brief outlines this submission.

The mandatory nature of the life-without-parole sentence imposed on Evan Miller provides an independently sufficient ground for its invalidation. The cornerstone of the Eighth Amendment analysis which informed this Court's *Roper* and *Graham* decisions is that youth and its attendant features have a critical role to play in determining an adolescent's culpability. To wholly disregard a 14-year-old offender's age and age-related characteristics in sentencing him to be

imprisoned for the remainder of his existence makes a mockery of this fundamental precept.

ARGUMENT

THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* AND *GRAHAM V. FLORIDA* CONTROLS THIS CASE.

The *Jackson* brief painstakingly examines this Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010).[5] To avoid tedious repetition here, a very brief summary of the Court's reasoning in those cases is in order:

A. The Eighth Amendment Reasoning of *Roper* and *Graham*

The cases start from the settled premise that the Eighth Amendment prohibits punishments which are excessive in relation to the moral culpability of the offender. *Roper*, 543 U.S. at 560; *Graham*, 130 S. Ct. at 2021. Both opinions explain and document in meticulous detail why the moral culpability of adolescent children cannot be judged in the same way as that of adults.

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[5] See the opening of the Argument section and Part A of the Argument (pp. 6-15) in the *Jackson* brief.

Adolescents are unfinished products, works-in-progress toward the adult character they have not yet formed. They are flooded by the hormonal surges of puberty; their underdeveloped brain structure and their lack of experience with the world leave them inadequately equipped to cope with the sensation-seeking, risk-taking impulses that they experience. The physiological growth and social acculturation which underlie adult behavioral controls are incomplete in them. They are uniquely subject to peer pressure and bad external influences. Economic and cultural realities and a phalanx of laws enacted to "protect" them combine to limit their ability to modify their surroundings or to move out of settings that provide unwholesome conditions of upbringing. These handicaps of immaturity and limitations of coping capability come to them through no fault of their own: In their early teens, they have not yet had a chance to take charge of their own lives and destinies. But that will change. Precisely because their signature characteristics are transitory, these children themselves are bound to change as they mature. Predicting what they will become is chancy, speculative, unreliable.

For all of these reasons, it is constitutionally impermissible to make a final, irrevocable judgment that a young teenager will forever be unsuited for life in free society and must be consigned to "die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends

the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033.

The core holding in *Graham* is that the Eighth Amendment forbids juvenile sentences that provide "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." 130 S. Ct. at 2032. Of course, that holding was rendered in the context of a nonhomicide crime. Respecting the settled practice of the Court "never to anticipate a question of constitutional law in advance of the necessity of deciding it,"[6] *Graham* forbore to address the question of whether its prohibition of lifelong incarceration of juvenile nonhomicide offenders applies to juvenile homicide offenders as well. But *Roper did* consider juvenile homicide offenders, and *Roper*'s reasons for holding that they could not be sentenced to die even for the crime of murder do not differ in any appreciable regard from *Graham*'s explicit rationale. Logically, *Graham* and *Roper* together establish an analytic framework which compels the conclusion that a life-without-parole murder sentence imposed on a 14-year-old child like Evan Miller violates the Eighth Amendment.

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[6] *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885), *quoted in, e.g., Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961), *and Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring).

B. The Sources of Information About Adolescence Recognized by *Roper* and *Graham* and Their Teaching Regarding the Relevant Characteristics of Young Teens in Particular

The reasoning common to *Graham* and *Roper* is also instructive regarding the sources to be consulted for insight into the features of adolescence which bear upon the culpability of young teens who commit murder. In assessing the moral culpability of juvenile offenders convicted of aggravated homicides, the Court in *Roper* noted that "scientific and sociological studies" of child development confirm what "any parent knows" about the frailties and vulnerability of adolescents. 543 U.S. at 569. *Graham* looked to "developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds." 130 S. Ct. at 2026. The *Roper* opinion collected (in its Appendices B, C, and D, 543 U.S. at 581-88) a multitude of state laws that, by denying adolescents the right to make important judgments reserved for adults, recognize the "comparative immaturity and irresponsibility of juveniles." *Id.* at 569.

All of these sources of information are canvassed in the *Jackson* brief.[7] Here we advert to them again only briefly, to emphasize their bearing on young

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[7] See the Subparts B.1 through C.2 of the Argument (pp. 16-34) in that brief.

teens specifically and to add a few details particular to young teens.

1. The Scientific Consensus Regarding the Relative Developmental Immaturity of Younger Teens

The factors which *Roper* and *Graham* recognized as critical for Eighth Amendment analysis in the case of adolescents – biologically based volatility and impetuosity,[8] underdeveloped self-control systems, inexperience resulting in deficient judgment, susceptibility to pressure from peers to engage in risky, antisocial, acting-out behavior, inability to structure their own environment or leave it even when it is destructive – are at their peak in young teens. Fourteen-year-olds find themselves in an especially precarious period of heightened vulnerability to impulsive, venturesome experimentation because they are trapped in "[t]he temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later."[9]

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[8] *See, e.g.*, Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions Psychol. Sci. 55, 56-58 (2007).

[9] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 54 (2009).

This is largely a matter of immature psychological and neurological development[10] and of having had too little time to learn ways of adjusting to their own drives and to the frustrations of the world around them without battling it. Middle-schoolers of 13 and 14 lack even the limited resources of reflectiveness, sense of self (including self-worth and future orientation), and ability to say "no" to peers that older teens and adults eventually acquire.[11] They have limited foresight of consequences[12] and are drawn to take risks rather than to avoid them.[13] Perhaps most important from the standpoint of the *Graham-Roper* analysis, they are just on the threshold of a period of growth and change that will radically remake them. "[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and

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[10] *See, e.g.*, B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in *From Attention to Goal-Directed Behavior* 249, 252-57 (F. Aboitiz & D. Cosmelli eds., 2009).

[11] Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 846 (1986) (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong").

[12] *See, e.g.*, Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 12 (1991); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 268 (2001).

[13] *See, e.g.*, Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008).

demands. . . ." L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 428 (2000). For most teens, the extensive maturation that occurs progressively throughout middle and late adolescence[14] will alter their character and greatly increase their ability to regulate impulses and resist external forces that can predispose them to criminal behavior.[15]

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[14] *See, e.g.*, Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. Adolescence 265, 267-70 (1989) (noting that 13-year-olds show less knowledge, have lower self-esteem as decision-makers, envision fewer choice options, and are less inclined to consider consequences than 15-year-olds); Laurence Steinberg, Sandra Graham et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 36 (2009) (reporting "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals"); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*, 18 Behav. Sci. & L. 741, 756 (2000) (noting the significant gains in psychosocial maturity that take place after age 16); Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Dev. Psychol. 1531, 1538-41 (2007) (documenting that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18"); *and see generally* Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why*, 1021 Annals N.Y. Acad. Sci. 51, 55 (2004).

[15] *See, e.g.*, Steinberg, *supra* note 9, at 66; L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 421 (2000) (adolescent experimentation in risk-taking is transient for most individuals).

2. The Legislative Recognition That Children in Their Early Teens Are Unready for Full Responsibility

"The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them." *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011). The peculiar need of younger teenagers for insulation from the harms that they can suffer through their own limited comprehension and poor judgment, no less than from exploitation by other individuals and institutions, is recognized by a wide array of state and federal statutes that distinguish between older adolescents and younger ones in the degrees of protection they afford and of self-autonomy they permit. *See infra* Appendix A. Several dozen such enactments can be found in Alabama alone.[16]

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[16] *See, e.g.*, Ala. Code § 13A-6-70 (child 15 or younger is incapable of consent to sexual activity). *Id.* §§ 30-1-4, 30-1-5 (child 15 or younger is incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). *Id.* § 8-17-222 (sale of fireworks to child 15 or younger is prohibited unless the child is accompanied by an adult). *Id.* § 26-1-3.1 (child 15 or younger is not permitted to donate blood; 16-year-old may donate blood, but only with parental consent). *Id.* § 22-19-163 (child 15 or younger is not permitted to donate organs). *Id.* § 32-5A-282 (child 15 or younger is required to wear a helmet when riding a bicycle). *Id.* §§ 32-6-7, 32-6-8, 32-5-64 (child 14 or younger cannot drive; 15-year-olds are eligible for a learner's permit only). *Id.* §§ 16-28-3, 16-28-3.1 (child aged 7 to 16 must attend school, 17-year-old may withdraw under certain circumstances). *Id.* § 25-8-33 (child 15 or younger cannot be employed, with exceptions for certain agricultural work and limited

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From marriage[17] and sex[18] to tattoos,[19] a ubiquitous nationwide legal regulation of dealings by and with

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work for 14- or 15-year-olds outside school hours); *see also id.* § 25-8-36 (limiting hours 14- and 15-year-olds are permitted to work). *Id.* §§ 34-5-5, 34-7A-22, 34-13-130 (child 15 or younger is ineligible to be licensed as a barber, cosmetology, or embalmer's apprentice). *Id.* §§ 27-14-5, 27-34-21 (child 14 or younger is incapable of contracting for insurance or joining a fraternal benefit society). *Id.* § 13A-6-69 (child 15 or younger is protected from enticement for immoral purposes). *Id.* §§ 13A-6-62 to 13A-6-67 (child between 12 and 15 is protected from sexual contact with older persons; these statutory provisions specify several crimes punishing such contact regardless of consent). *Id.* § 13A-6-40 (child 15 or younger is given special protection from kidnapping by providing that restraint is "without consent" even if the child acquiesces, unless a parent or guardian has given consent). *Id.* §§ 13A-6-120 to 13A-6-127 (child 15 or younger is protected while using the Internet; these statutory provisions create several felonies relating to use of computers to entice or lure children). *Id.* § 13A-13-6 (making it a crime to cause a child 15 or younger to engage in an occupation with substantial risk to life or health). *Id.* § 15-3-5 (no statute of limitations for sex offense against child 15 or younger). *Id.* §§ 15-25-2, 15-25-3 (child 15 or younger who is a victim of a sex crime is protected by provisions authorizing his or her videotaped deposition or closed-circuit testimony in a criminal prosecution for a sexual offense). *Id.* § 32-5-222 (penalizing the driver of a vehicle when a child 14 or younger does not wear a seat belt).

[17] *See* note 30 at page 30 of the *Jackson* brief and *infra* Appendix A.

[18] *See* notes 31 and 37 at pages 30 and 32 of the *Jackson* brief and *infra* Appendix A. *See also* 25 C.F.R. § 11.407 (sexual relations with a child under 16 is sexual assault under the code governing Indian reservations).

[19] *See, e.g.*, Idaho Code Ann. § 18-1523 (child 14 to 17 can be tattooed only with parental consent); *see also, e.g.*, Cal. Penal Code § 653 (misdemeanor to tattoo or offer to tattoo child 17 or younger); Wis. Stat. Ann. §§ 948.01, 948.70 (16 or younger may

(Continued on following page)

children demonstrates a broad consensus that those in the early years of adolescence differ markedly from adults and even older teens with regard to the responsibilities they can be expected to exercise. *See* Part C of the Argument (pages [24]-[28]) in the *Jackson Brief*.

Child-labor laws[20] and compulsory education laws[21] commonly differentiate younger from older teens. In the past 15 years, 49 states and the District of Columbia have enacted driver's licensing schemes that place heightened restrictions on the youngest drivers – requirements of adult supervision, limits on nighttime driving and carrying passengers, and so forth – which relax as drivers get older.[22] The overwhelming

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not be tattooed except for medical reasons); S.C. Code Ann. § 44-34-60 (child 17 or younger cannot be tattooed; child 17 or younger who is given tattoo can bring action against tattoo artist for actual and punitive damages).

[20] *See* note 41 at page 33 of the *Jackson* brief and *infra* Appendix A.

[21] *See* note 40 at page 33 of the *Jackson* brief and *infra* Appendix A.

[22] *See* note 14 at page 22 of the *Jackson* brief. These graduated licensing laws followed federal government and industry studies showing that teenage drivers' immaturity, inexperience, and propensity for risk-taking makes them the most likely drivers to be involved in a fatal crash. *See* U.S. Gov't Accountability Office, GAO-10-544, *Teen Driver Safety, Report to the Committee on Transportation and Infrastructure and its Subcommittee on Highways and Transit*, House of Representatives 3 (2010); *see also* National Highway Traffic Safety Administration, *Teen Driver Crashes: A Report to Congress* 1-7 (2008); Insurance Institute for Highway Safety, *Young Driver Licensing Systems in*

(Continued on following page)

majority of states (41) do not allow 14-year-olds to drive under any circumstances; and all but five of the 43 states that permit 15-year-olds to drive require adult supervision.[23] Laws in 45 states restrict the number of passengers that teen drivers can carry.[24]

3. The Particular Unreliability and Harshness of a Life-Without-Parole Sentence for Younger Teens

Graham noted that "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 130 S. Ct. at 2032. And in the setting of an adversarial procedure for determining guilt and the degree of an offender's

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the U.S. (2011), http://www.iihs.org/laws/GraduatedLicenseCompare.aspx. In fact, "[t]he fatal crash rate per million miles for 16-year-old drivers is more than 7 times the rate for drivers aged 30 to 59 years." Li-Hui Chen et al., *Carrying Passengers as a Risk Factor for Crashes Fatal to 16- and 17-Year-Old Drivers*, 283 J. Am. Med. Assn. 1578, 1578 (2000).

[23] *See* Insurance Institute for Highway Safety, *supra* note 22; *see also* National Highway Traffic Safety Administration, *supra* note 22, at 3-7.

[24] Insurance Institute for Highway Safety, *supra* note 22. Studies show that the incidence of fatal motor vehicle crashes involving 16- and 17-year-old drivers increases with the number of passengers, especially teenage passengers. Driving after drinking alcohol or using drugs, speeding, swerving, crossing the center line, purposely skidding, and running a red light were strongly associated with the presence of peers. Li-Hui Chen et al., *supra* note 22, at 1581.

guilt, disadvantage entails the danger of unreliability. *Graham*'s observation that "[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it" (*id.*) is especially cogent in the case of younger teens.[25] They are peculiarly at risk of erroneous convictions and offense-degree determinations[26] and they are at even greater risk of erroneous predictions of culpability and incorrigibility.[27]

Graham further recognized that a life-without-parole sentence "alters the offender's life by a forfeiture that is irrevocable" (130 S. Ct. at 2027) and that the severity of the forfeiture is greater in proportion

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[25] *See* notes 45-48 and accompanying text at pages 38-39 of the *Jackson* brief; *see also* Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 Law & Human Behav. 219, 226 (2002) (adolescence is time of dramatic changes in identity, during which an adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender").

[26] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 356 (2003) (finding that one of every three 11- to 13-year-olds and one of every five 14- to 15-year-olds showed impairments in competency that would result in a mentally ill adult being found incompetent to stand trial).

[27] *See* notes 14-15 *supra* and the text accompanying and preceding them.

to the youth of the offender who suffers it.[28] Not only is a young teen deprived of more years than an older one, but these years are years of special importance. As *Graham* pointed out, "it is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration." *Id.* at 2033. For young teens, the deprivation of these supports at the formative stage of life which they are just entering – a period that "is second only to the neonatal period in . . . rapid biopsychosocial growth as well as changing environmental characteristics and demands"[29] – is cruelly calculated to cripple their "potential to attain a mature understanding of . . . [their] own humanity" (*Roper*, 543 U.S. at 574).

C. The Singularly Problematic Status of Mandatory Life-Without-Parole Sentences for Young Teens Under *Roper* and *Graham*

There is no mistaking the central perception which underlies the Eighth Amendment rulings and reasoning in *Roper* and *Graham*. Juveniles are categorically different than adults because they have not reached the stage of development at which a

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[28] "Under this sentence, a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2028. For this reason, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.*

[29] *See* the text at pages 14-15 *supra*, between notes 13 and 14.

definitive judgment can reliably or fairly be made that their incorrigibility or degree of culpability warrants their permanent, irrevocable expulsion from society. If that was true of older adolescents like Christopher Simmons and Terrance Graham, it is true *a fortiori* of 14-year-olds like Evan Miller and Kuntrell Jackson. So, even had the life-without-parole sentences of these young teens been imposed after thorough-going consideration of their individual crimes, characters, and life circumstances – as the sentences of Christopher Simmons and Terrance Graham were – they would be starkly at odds with the *Roper* and *Graham* decisions.

That is not, however, the factual or constitutional worst of it. For Evan Miller and Kuntrell Jackson were sentenced to life without parole as a mandatory consequence of their convictions for murder, with no consideration of their individual crimes, characters, life circumstances, or even of their young age. *Mandatory* life-without-parole sentencing of young teens introduces added Eighth Amendment difficulties of two kinds:

1. Mandatory Sentences Are Especially Problematic as a Measure of the Acceptability of Life Without Parole as a Proper Punishment in Light of Contemporary Standards of Decency.

Graham reaffirmed the well-established principle that "[a]ctual sentencing practices are an important

part of the Court's inquiry into consensus." 130 S. Ct. at 2023. Their importance, as the Court explained in *Enmund v. Florida*, 458 U.S. 782 (1982), arises from the consideration that "the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved" in the individualized sentencing determinations required in death penalty cases. *Id.* at 794 (quoting *Coker v. Georgia*, 433 U.S. 584, 596 (1977), quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)); *and see Thompson v. Oklahoma*, 487 U.S. 815, 831-33 (1988) (observing that the Court has examined the behavior of juries "in determining the acceptability of capital punishment to the American sensibility").

Case-by-case sentencing decisions are a reliable measure of consensus about the appropriateness of capital punishment because "[a] central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case." *Roper*, 543 U.S. at 572. In the aggregate, the number of death sentences imposed (and carried out) is a significant indicator of society's acceptance of capital punishment for entire categories of defendants because that number reflects choices made by sentencing juries and judges who were obliged to consider and give effect to all relevant circumstances, including youth, which bear upon the fit between culpability and sentence. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978). In contrast,

mandatory life-without-parole sentences, imposed automatically upon conviction without consideration of the offender's age or any other mitigating circumstances, do not reflect the considered determination of a sentencing jury or judge about the appropriateness of the sentence.

It is therefore informative to consider the procedures through which the present population of offenders serving sentences of life without parole for murder at age 14 or younger received those sentences. As noted in the *Jackson* brief, that total population, accumulated over the 40 years since 1971, is approximately 79.[30] Only eight of the 79 were sentenced to life imprisonment without parole under discretionary sentencing schemes.[31] The remainder,

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[30] See the Subpart E.3 of the Argument (pp. 47-50) in the *Jackson* brief.

[31] John Ponder and John McNeely were sentenced for first degree murder pursuant to Ark. Code Ann. §§ 5-4-401(a)(1), 5-10-102, *see* http://adc.arkansas.gov/inmate_info/index.php (search last name Ponder, first name John; and last name McNeely, first name John), *see also Ponder v. State*, 953 S.W.2d 555 (Ark. 1997); Jack Jewitt was sentenced for first degree murder pursuant to Ariz. Rev. Stat. §§ 13-703, 13-1105 (1993), *see State v. Trostle*, 951 P.2d 869, 875 (Ariz. 1997); Aundra Akins was sentenced for attempted first degree murder and second degree murder pursuant to Fla. Stat. Ann. §§ 777.04, 782.04(1), and Demetrius Carey was sentenced for second degree murder pursuant to Fla. Stat. Ann. § 782.04(2), (3), *see* http://www.dc.state.fl.us/ActiveInmates/ (search last name Akins, first name Aundra; and last name Carey, first name Demetrius); John Colasurdo was sentenced for first degree murder pursuant to Ill. Stat. Ann. Ch. 38 §§ 9-1, 1005-8-1 (1990), *see Colasurdo Sentenced to Life*,

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90% of the individuals sentenced to life without parole in the past four decades, were given those sentences automatically upon conviction, under mandatory sentencing regimes. Only two of the eight non-mandatory life-without-parole sentences were imposed within the past ten years.[32] Plainly, where sentencers have had discretion to consider a lesser sentence, they have almost always chosen it as the fitting punishment for murder committed by a young teen.

2. Mandatory Life-Without-Parole Sentencing Denies Juveniles Any Consideration of the Mitigating Force of Youth, in Stark Disregard of the Recognition in *Roper* and *Graham* That Youth Is a Factor of Critical Importance in Proportioning Punishment to an Adolescent's Offense.

Roper and *Graham* hold that the special characteristics of youth require consideration in determining whether a sentence which "alters the offender's life by a forfeiture that is irrevocable" (*Graham*, 130 S. Ct. at 2027) is constitutionally excessive. No sense

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Kankakee Daily J., July 2, 2008, at A1, http://www.daily-journal.com/print_archive/a01-DJ_07022008-CMYK.pdf; Jason Bryant was sentenced for first degree murder pursuant to Tenn. Code Ann. § 39-13-202, *see State v. Howell*, 34 S.W.3d 484, 490-91 (Tenn. Crim. App. 2000); and Omer Ninham was sentenced for first degree intentional homicide pursuant to Wis. Stat. Ann. §§ 939.50, 940.01, 973.014, *see State v. Ninham*, 797 N.W.2d 451,455 (Wis. 2011).

[32] *Id.* (Demetrius Carey & John Colasurdo).

at all can be made of these precedents if they do not stand for that basic proposition at the least. Imposition of a mandatory life-without-parole sentence on an adolescent – such as Evan Miller has received – denies the adolescent any consideration of his age or of the relevance of its special, signature characteristics before he is excluded from normal human society for the rest of his lifetime. It is impossible to square that denial with the deepest, most indisputable, and most rudimentary understanding of *Roper* and *Graham*.

Thus, the court below was incorrect in believing that *Harmelin v. Michigan*, 501 U.S. 957 (1991), resolves the Eighth Amendment issue presented by Evan Miller's mandatory sentence of life imprisonment without the possibility of parole. Mandatory life-without-parole sentencing of *children* is different from mandatory long-term sentencing of *adults* in precisely the same way, and for precisely the same reason, that *Roper* and *Graham* held children are constitutionally different from adults. What is wrong with mandatory life-without-parole sentencing of children is what it removes from the process of proportioning punishment to culpability. It removes any consideration of the special features of childhood which *Roper* and *Graham* found constitutionally compelling. It flouts *Graham*'s instruction that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take

defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031.[33]

Evan Miller's case concretely illustrates this failure. His crime was committed under circumstances that mirror those which *Roper* and *Graham* recognized as prototypical for young adolescents and as diminishing their culpability. Evan was with a peer, an older teen. They were sought out at bedtime by the victim, an adult, who gave them alcohol and induced them to procure marijuana which he then shared with them in his home. An altercation ensued for reasons that are unclear. It was initiated when the victim grabbed Evan by the throat. By this time Evan was full of intoxicants, and he responded violently. He and his companion began beating the victim with a bat. They then set fires in the victim's house. The result was horrible: 52-year-old Cole Cannon died of smoke inhalation. There can be no disputing the ugly aspects of this crime. Under a discretionary sentencing procedure, those aspects could have been proper for consideration by his sentencer. But the sentencer would also have had to ask whether they were explained or mitigated to some extent by Evan's young age and upbringing in a household of abuse, neglect, and instability, with no

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[33] Chief Justice Roberts, concurring in the *Graham* judgment, agreed that, in evaluating a sentence of life without parole imposed upon a juvenile, "[t]here is no reason why an offender's juvenile status should be excluded from the analysis," and, indeed, an offender's age should play a "central role." *Id.* at 2039.

real nurture and with nothing but the worst of adult role models. And the sentencer would also have been able to consider Evan's sincere expression of remorse for his participation in the crime, as well as the more lenient sentence received by his older, equally culpable co-defendant.[34]

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[34] A large number of the 79 cases in which children 14 or younger were sentenced to life without parole involved older co-defendants, and in many of these cases – as here and in Kuntrell Jackson's case – the older co-defendants received lesser sentences, despite facts demonstrating that the co-defendant was equally or more culpable. *See, e.g.*, *Hodge v. State*, 970 So. 2d 923, 926 (Fla. Dist. Ct. App. 2008) (13-year-old convicted of first degree felony murder as principal but not shooter; court found that the jury was convinced by defense argument that defendant's confession, in which he admitted to being the shooter was untrue, yet four co-defendants, including a 17-year-old, were given only ten-year sentences pursuant to second degree murder convictions, *see* http://www.dc.state.fl.us/ActiveInmates/ (search DC Numbers: C00385, K71179, K70983, K71014)); *State v. Tolliver*, 639 S.E.2d 673 (N.C. Ct. App. 2007) (14-year-old sentenced to LWOP while three 15-year-old co-defendants who were directly involved in robbery-beating death of victim each received 26-32 years); *Jordan v. State*, 917 S.W.2d 164, 167 (Ark. 1996) (14-year-old convicted of capital murder and sentenced to LWOP while 22-year-old co-defendant identified as the shooter but sentenced to 50 years; *see* http://adc.arkansas.gov/visitors/Pages/inmateInformation.aspx (search Cedric Harris, serving LWOP, and Alvis Jordan, not currently incarcerated)); *Commonwealth v. Olds*, 469 A.2d 1072 (Pa. Super. Ct. 1983) (14-year-old who was outside convenience store when 16-year-old co-defendant Roderick Todd Allen shot and killed store customer sentenced to LWOP while Allen not convicted of homicide, *see* http://ujsportal.pacourts.us/docketsheets/cp.aspx (search: CP-02-CR-0007206-1979)).

As it was, none of these factors – mitigating *or* aggravating – entered into the determination of the appropriate sentence for Evan and his crime. He was simply sent off to prison for life-without-parole as an automatic consequence of his conviction for arson-murder. Such a judgment cannot be squared with this Court's judgments in *Roper* and *Graham* that punishment must constitutionally be proportioned to culpability and that the youth and youthful frailties of an adolescent offender bear crucially on culpability.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A*

ALABAMA

Laws establishing minimum age for rights and responsibilities: Ala. Code § 13A-6-70 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* §§ 30-1-4, 30-1-5 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). *Id.* § 8-17-222 (sale of fireworks to child 15 or younger prohibited unless accompanied by adult). *Id.* § 26-1-3.1 (child 15 or younger not permitted to donate blood; 16-year-old may donate blood, but only with parental consent). *Id.* § 22-19-163 (child 15 or younger may not donate organs unless emancipated). *Id.* § 32-5A-282 (child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 32-6-7, 32-6-7.2, 32-6-8 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit only; 16-year-old eligible only for restricted license); *see also id.* § 32-5-65 (providing criminal penalties for adults who allow children 15 and younger to operate motor vehicles other than through authorized driver training programs). *Id.* §§ 16-28-3, 16-28-3.1 (child aged 7 to 16 must attend school, 17-year-old may withdraw under certain circumstances). *Id.* § 16-1-42 (child 15 or younger not eligible to obtain high school diploma on fast track program). *Id.* § 26-1-5 (child 16 or younger may not contract for

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* All statutes are current per Westlaw as of January 9, 2012. This appendix provides examples of relevant statutes and is not an exhaustive listing.

educational loan). *Id.* § 31-2-2 (child 16 or younger not eligible to serve in Alabama National Guard). *Id.* § 25-8-33 (child 15 or younger may not be employed, with exceptions for certain agricultural work and limited work for 14- or 15-year-old outside school hours); *see also id.* § 25-8-36 (limiting hours 14- and 15-year-olds permitted to work). *Id.* §§ 34-5-5, 34-7A-22, 34-13-130 (child 15 or younger ineligible to be certified as apprentice in cosmetology or as barber or embalmer). *Id.* §§ 27-14-5, 27-34-21 (child 14 or younger incapable of contracting for insurance or joining fraternal benefit society). *Id.* §§ 9-11-44, 9-11-50, 9-11-53, 9-11-53.1 (child 15 or younger ineligible for hunting or fishing licenses).

Laws extending extra protection to young adolescents: Ala. Code § 13A-6-69 (children 15 and younger protected from enticement for immoral purposes). *Id.* §§ 13A-6-62, 13A-6-64, 13A-6-67 (children 13, 14, and 15 protected from sexual contact with persons 2 years older through the criminalizing of such contact regardless of consent). *Id.* § 13A-12-111 (children 15 or younger protected from prostitution). *Id.* § 13A-6-40 (children 15 and younger protected from kidnapping through provision stating that restraint is "without consent" even if child acquiesces, unless parent or guardian has given consent). *Id.* §§ 13A-6-120 to 13A-6-123 (children 15 and younger protected while using Internet by creation of several felonies relating to use of computers to entice or lure children); *see also id.* §§ 13A-6-124, 13A-6-125 (children 15 and younger protected by criminalization of

any travel preceding unlawful sexual act with child). *Id.* § 13A-13-6 (crime to direct or authorize child 15 or younger to engage in occupation involving substantial risk to life or health). *Id.* §§ 15-25-2, 15-25-3 (child 15 or younger who is victim of physical or sexual offense protected through provision authorizing victim's videotaped deposition or closed-circuit testimony in criminal prosecution of offense). *Id.* § 45-17-81.12 (prohibiting pretrial diversion if victim was a child of 14 or younger). *Id.* § 15-3-5 (no statute of limitations for sex offense against child 15 or younger). *Id.* § 14-1-8 (Board of Department of Corrections must notify protective services about children 15 and younger whose parents are incarcerated).

ALASKA

Laws establishing minimum age for rights and responsibilities: Alaska Stat. Ann. § 11.41.436 (West) (child 15 or younger cannot consent to sex, except that child 13 to 15 can consent with person less than 4 years older). *Id.* § 25.05.171 (child 14 or 15 may marry only with judicial and parental consent; child 16 or 17 may marry only with parental consent). *Id.* § 13.52.173 (child 15 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 09.55.590 (child 15 or younger ineligible for emancipation). *Id.* § 08.13.217 (minor may not receive tattoo, and may not receive body piercing without consent and presence of parent during procedure). *Id.* §§ 28.15.031, 28.15.051 (child 14 or 15 ineligible for driver's license and may only

receive learner's permit or special/temporary license). *Id.* § 14.30.010 (children 7 to 16 must attend school, with certain limited exemptions). *Id.* § 23.10.332 (children 16 or younger may not work without written authorization from commissioner, with limited exceptions); *see also id.* § 23.10.340 (limiting work hours for children 15 and younger); *id.* § 23.10.350 (child 15 or younger may not work in hazardous jobs; child 16 or 17 requires written exemption from state official to do so). *Id.* § 21.84.025 (child 14 or younger ineligible for adult membership in fraternal benefit society).

Laws extending extra protection to young adolescents: Alaska Stat. Ann. § 11.41.100 (homicide elevated to first-degree murder where death of child 15 or younger occurs during sex offense, kidnapping, or course of physical abuse on child). *Id.* § 11.41.110 (negligent homicide elevated to second-degree murder where victim is child 15 or younger and defendant previously convicted of felony against child of such age). *Id.* §§ 11.41.452 (protecting children 15 and younger from adult Internet predators by punishing persons 18 or older who use a computer to entice such children to engage in sexual conduct). *Id.* §§ 11.41.458, 11.41.460 (enhancing severity of crime for indecent exposure where done in presence of child 15 or younger). *Id.* § 11.41.260 (enhancing severity of crime for stalking where victim 15 or younger). *Id.* § 11.41.370 (for purposes of kidnapping, restraint is "without consent" even if child 15 or younger acquiesces, unless parent or guardian has given consent). *Id.* § 11.56.765 (protecting children 15 and younger by

making it crime for witness to fail to report kidnapping, murder, or certain sex crimes against such children). *Id.* § 12.45.046 (child 15 or younger who is victim or witness to crime protected from mental or emotional strain of open-court testimony in criminal prosecution by provision allowing testimony by closed-circuit television or through one-way mirror).

ARIZONA

Laws establishing minimum age for rights and responsibilities: Ariz. Rev. Stat. Ann. §§ 13-1405, 13-1407 (West) (child 14 or younger incapable of consenting to sex, with exception for marriage; child 15 to 17 capable of consent only with spouse, person under 19, or person less than 2 years older than child with whom child attends high school). *Id.* § 25-102 (child 15 or younger cannot marry without parental consent and judicial approval; child 16 or 17 requires parental consent). *Id.* § 44-134 (child 15 or younger incapable of consenting to donate blood; child 16 or 17 may not do so without parental consent). *Id.* § 28-3153 (child 14 or younger cannot drive; children 15 to 17 progressively eligible for learner's permits and restricted licenses). *Id.* § 36-843 (child too young to apply for driver's license cannot consent to organ donation, unless emancipated); *cf. id.* § 12-2451 (child 15 or younger ineligible for emancipation). *Id.* § 15-802 (children between ages 6 and 16 must attend school). Ariz. Const. art. 18, § 2 (child 15 or younger may not be employed in mines, hazardous occupations, or for more than 8 hours a day). Ariz. Rev. Stat.

Ann. § 32-322 (child 15 or younger ineligible for barber license). *Id.* § 20-1106 (child 14 or younger incompetent to contract for insurance). *Id.* § 20-865 (child 14 or younger ineligible for membership in fraternal benefit society). Ariz. R. Civ. P. 4.1 (summons for child 15 or younger must be served on child and parent or guardian). Ariz. Rev. Stat. Ann. § 36-881 (for purposes of regulating day care centers, child defined as person 14 or younger).

Laws extending extra protection to young adolescents: Ariz. Rev. Stat. Ann. § 13-705 (providing enhanced penalties for dangerous crimes committed by adults against children, including specific category of enhanced penalties where victim is child 12 to 14). *Id.* § 13-751 (enhanced mandatory minimum sentence for murder of child 14 or younger). *Id.* §§ 13-1402 to 13-1406, 13-1410, 13-1419, 13-3206 (enhancing culpability for various sexual offenses where victim is child 14 or younger). *Id.* § 13-3407.01 (separate crime to manufacture methamphetamine under circumstances causing physical injury to child 14 or younger). *Id.* § 28-1383 (enhanced penalty for driving while intoxicated when child 14 or younger in vehicle); *see also id.* § 5-396 (same for operation of watercraft). *Id.* § 28-909 (penalizing driver of vehicle when child 15 or younger fails to wear seat belt). *Id.* §§ 13-4251, 13-4253 (child 14 or younger who is victim of or witness to crime may be permitted to testify in criminal prosecution via closed-circuit television or videotape instead of in open court). Ariz. Const. art. 22, § 16 (children 17 or younger accused or

convicted of a crime may not be confined in the same section of any jail or prison as adult prisoners).

ARKANSAS

Laws establishing minimum age for rights and responsibilities: Ark. Code Ann. § 5-14-27 (West) (child 15 or younger cannot consent to sexual activity with person 20 or older, with exception for marriage). *Id.* §§ 9-11-102, 9-11-103, 9-11-105 (males 16 and younger and females 15 and younger cannot contract for marriage; child 17 and younger cannot do so without parental consent; exception allowed upon court order where couple has child or female is pregnant). *Id.* § 20-27-301 (child 15 or younger prohibited from donating blood; 16-year-old requires parental consent). *Id.* § 20-17-1204 (child 15 or younger incapable of consenting to organ donation, unless emancipated minor); *cf. id.* § 9-27-362 (child 16 or younger may not be emancipated). *Id.* § 27-16-604 (child 15 or younger ineligible for intermediate driver's license). *Id.* § 27-101-602 (child 15 or younger may not operate personal watercraft unaccompanied). *Id.* § 27-20-106 (children aged 14 and 15 may obtain license to operate motorcycles only with 250 cc or smaller engines); *see also id.* § 27-20-110 (child 15 or younger prohibited from carrying a passenger on motor-driven cycle or motorized bike). *Id.* § 6-18-201 (children aged 5 to 17 must attend school). *Id.* § 6-65-105 (child 14 or younger prohibited from enrolling in state agricultural colleges). *Id.* § 6-65-212 (child 14 or younger

prohibited from enrolling in Arkansas State University-Beebe). *Id.* § 6-51-202 (child 15 or younger not eligible to enroll in state vocational-technical and adult education schools of less than college grade). *Id.* §§ 11-6-105, 11-6-106 (children 15 and younger barred from employment in certain dangerous activities or where alcohol is sold). *Id.* § 11-6-108 (limiting hours and times when children 15 and younger may work). *Id.* § 11-6-109 (employers of children 15 and younger required to acquire employment certificates from Department of Labor). *Id.* § 11-12-104 (children 15 and younger may be employed in entertainment industry only if certain requirements met and conditions provided). *Id.* § 23-89-511 (child 15 or younger cannot operate amusement park ride). *Id.* § 17-26-304 (child 15 or younger cannot be licensed as cosmetologist, manicurist, or aesthetician); *see also id.* § 17-20-302 (child younger than 16 years 6 months cannot be licensed as barber). *Id.* § 23-74-201 (child 14 or younger cannot hold adult membership in fraternal benefit society). *Id.* § 23-35-502 (child 15 or younger cannot vote in member meetings, either personally or through parent or guardian, nor become a director or committee member, of any credit union). *Id.* § 9-26-104 (child 15 or younger may not transact business or buy or sell real estate, and court may not remove disability of minority for those children). *Id.* § 12-61-101 (children 16 and younger not eligible for state militia). *Id.* §§ 6-18-1102, 6-18-1104 (children 15 or younger may not solely accompany elementary school students selling fund-raising merchandise door-to-door). *Id.* § 16-55-114 (in civil cases, child 15

or younger not competent to receive service of notice for another person at child's residence). *Id.* §16-19-506 (for Justice of the Peace Courts, child 14 or younger not competent to receive service of process for another person residing at child's residence). *Id.* § 18-60-813 (child 15 or younger not competent to receive sheriff's order for recovery of personal property and for replevin). *Id.* § 28-1-112 (child 14 or younger not competent to receive notice for another person at same residence of child in probate court proceedings). *Id.* §§ 15-42-104, 15-42-106 (child 15 or younger ineligible for hunting or fishing licenses). *Id.* § 16-32-302 (children 15 and younger not included in initial list provided by Department of Finance and Administration to Secretary of State for compilation of state's enhanced prospective juror pool). *Id.* § 24-12-117 (children 15 and younger entitled to survivor benefits from state retirement and pension fund, if employee parent dies during performance of his or her duties or of natural causes, or dies when already retired and pensioned).

Laws extending extra protection to young adolescents: Ark. Code Ann. § 5-10-101 (homicide elevated to capital murder where victim 14 or younger and defendant 18 or older). *Id.* § 5-10-102 (homicide elevated to first-degree murder where victim 14 or younger). *Id.* § 5-14-110 (crime for person 18 or older to cause child 14 or younger to expose himself, or to solicit such child for sexual activity). *Id.* § 5-26-202 (children 15 and younger incapable of committing incest). *Id.* § 5-16-102 (enhanced penalty for voyeurism

where victim 16 or younger). *Id.* § 5-14-129 (children 15 and younger protected by provision prohibiting sex offenders from employment involving interaction with children). *Id.* § 12-12-913 (information regarding Level 2 sex offenders to be made public if victim was child 14 or younger and offender was 18 or older at time of offense). *Id.* § 12-29-404 (exempting sex offenders from eligibility for medical parole if victim was child 14 or younger). *Id.* §§ 9-27-303, 12-18-103 (defining sexual abuse as occurring when an adult 18 or older abuses a child 14 or younger, or adult 20 or older abuses a child 15 or younger). *Id.* §§ 5-27-601 to 5-27-608 (protecting children 16 and younger by criminalizing computer crimes against children). *Id.* § 5-27-306 (protecting children 15 and younger from Internet stalking). *Id.* §§ 5-4-701, 5-4-702 (protecting children 15 and younger by providing enhanced penalties for certain violent felonies committed in their presence). *Id.* § 5-65-111 (enhanced penalty for operating motor vehicle while intoxicated when child 15 or younger in car). *Id.* §§ 27-34-103, 27-34-104 (penalizing driver of vehicle when child 14 or younger fails to wear seat belt). *Id.* § 16-44-203 (child 16 or younger who is victim of sex offense protected through rule authorizing testimony of child by videotaped deposition in criminal prosecution). *Id.* § 9-27-510 (child 15 or younger cannot be transported to adult prison even when serving adult sentence); *see also id.* § 5-4-402 (child 15 or younger who is sentenced as adult to remain in custody of Division of Youth Services until 16th birthday). *Id.* § 16-90-601 (any child 15 or younger given a suspended sentence

for a felony and subsequently pardoned shall have his or her criminal record expunged). *Id.* § 27-50-907 (personal information of children 15 and younger found in their drivers' records not made available to Arkansas military recruiting coordinators). *Id.* §§ 12-12-1603 to 12-12-1610 (protecting children 15 and younger by allowing organizations serving children to request criminal background checks of any volunteers).

CALIFORNIA

Laws establishing minimum age for rights and responsibilities: Cal. Penal Code § 261.5 (West) (child 15 or younger incapable of consenting to sexual intercourse with person 21 years or older who is not the child's spouse). Cal. Fam. Code § 302 (child 17 or younger requires judicial and parental consent to marry). Cal. Health & Safety Code § 12689 (sale of "safe and sane" fireworks to child 15 or younger prohibited). *Id.* § 1607.5 (child 14 or younger incapable of donating blood; 15- or 16-year-old requires parental consent and physician authorization). *Id.* § 7150.15 (child 14 or younger incapable of consenting to organ donation, unless emancipated minor; child between 15 and 18 requires parental consent). Cal. Veh. Code §§ 12512-12514, 12814.6 (children under 17 ineligible for license to drive; 14-year-old eligible for junior permit under extraordinary circumstances; child 15 years 6 months eligible for instruction permit; 16- and 17-year-olds eligible for provisional license only). Cal. Harb. & Nav. Code § 658.5 (child 15

or younger prohibited from operating certain vessels). Cal. Educ. Code § 48200 (children aged 6 to 17 must attend school, with some exemptions). *Id.* § 48232 (children 14 or younger may not take leave of absence from school). Cal. Lab. Code §§ 1290, 1292, 1293, 1294, 1294.5, 1297 (children 15 or younger prohibited from employment in dangerous jobs or tasks). *Id.* § 1294.3 (children 14 or 15 allowed only limited employment). *Id.* § 1391 (limiting hours of employment for children 15 and younger). Cal. Bus. & Prof. Code §§ 2866, 7321, 7321.5, 7324, 7326 (child 16 or younger ineligible to be licensed as vocational nurse, cosmetologist, barber, aesthetician, manicurist). *Id.* § 22706 (children under 17 may not use ultraviolet tanning device). *Id.* § 18702 (child 15 or younger ineligible to be licensed as contestant in boxing, wrestling, or martial arts match). Cal. Ins. Code § 10112 (child 15 or younger requires parental consent to contract for insurance). *Id.* § 11023 (child 14 or younger ineligible for admission to fraternal benefit society).

Laws extending extra protection to young adolescents: Cal. Penal Code § 653j (protecting children 15 and younger from vulnerability to influence by making it a crime for person 18 or older to solicit, induce, or encourage child of such age to commit certain violent felonies). *Id.* § 288 (protecting children 14 and 15 from lewd and lascivious acts by persons at least 10 years older than child). *Id.* § 272 (crime for any person to contribute to the delinquency of child 17 or younger). *Id.* §§ 266h-266k (enhanced

penalties for pimping, pandering with, or procuring for purposes of prostitution child 15 or younger). *Id.* § 14205 (missing person report for child 15 or younger given special priority). *Id.* § 310 (crime to admit child 15 or younger to prizefight or cockfight). Cal. Lab. Code § 1308 (crime to cause child 15 or younger to engage in dangerous employment). *Id.* § 1219.5 (child 15 or younger protected by special procedures before court may impose contempt for refusal to testify or take oath). Cal. Penal Code § 1346 (child 15 or younger who is victim of sex crime protected from emotional trauma through provisions authorizing use of videotaped deposition of victim 15 or younger). Cal. Veh. Code § 27360.5 (penalizing driver of vehicle when child 15 or younger does not wear seat belt). Cal. Welf. & Inst. Code § 211 (children 15 and younger not to be housed in Department of Corrections facility).

COLORADO

Laws establishing minimum age for rights and responsibilities: Colo. Rev. Stat. Ann. § 18-3-402 (West) (child 14 or younger incapable of consent to sexual activity except with persons less than four years older; child 15 or 16 incapable of consent except with persons less than ten years older). *Id.* § 14-2-108 (child 15 or younger may not marry without parental and judicial consent). *Id.* § 12-28-102 (child 15 or younger prohibited from purchasing fireworks). *Id.* § 33-6-107 (child 15 or younger not allowed to hunt wildlife unless accompanied by adult). *Id.* § 13-22-104 (child 15 or younger incapable of donating

blood, organ, or tissue; child 16 or 17 may not do so without parental consent). *Id.* § 12-34-104 (child 15 or younger incapable of making anatomical gift decision unless emancipated); *cf. id.* § 19-1-103 (child 15 or younger unable to be emancipated); *see also* § 13-22-103 (child 14 or younger incapable of consent to organ or tissue donation or making decisions regarding personal medical care). *Id.* §§ 42-2-104, 42-2-106 (child 14 or younger cannot drive; 15-year-old eligible for instruction permit only). *Id.* § 22-33-104 (children between 6 and 16 years old must attend school). *Id.* § 8-12-105 (children 15 or younger prohibited from working during certain nighttime hours). *Id.* § 8-12-109 (child 15 or younger prohibited from employment involving operation of a motor vehicle). *Id.* § 12-8-114 (child 15 or younger ineligible to be licensed as barber or cosmetologist). *Id.* § 10-4-104 (child 15 or younger incapable of contracting for insurance). *Id.* § 10-14-201 (child 14 or younger incapable of joining fraternal benefit society). *Id.* § 27-65-103 (child 14 or younger may not consent to mental health services). *Id.* § 13-40-108 (child 14 or younger ineligible to accept service of notice to quit or demand for possession of real property).

Laws extending extra protection to young adolescents: Colo. Rev. Stat. Ann. § 18-3-305 (children 14 and younger protected from enticement). *Id.* § 18-3-306 (children 14 and younger protected from luring over Internet by persons more than four years older). *Id.* § 18-18-406 (imposing enhanced penalties selling or providing any amount of marijuana to a

child 14 or younger). *Id.* § 18-3-405 (children 14 and younger protected from sexual assault by persons at least four years older). *Id.* § 18-3-405.6 (enhanced penalty for invasion of privacy of children 14 or younger for sexual gratification by person four or more years older than child). *Id.* § 16-4-201.5 (protecting children 14 and younger by not granting bail to person convicted of sexual assault of such children). *Id.* § 18-3-413 (child 14 or younger who is the victim of sex crime protected through provision authorizing victim's videotaped deposition in criminal prosecution for sexual offense). *Id.* § 42-4-236 (making driver or operator of motor vehicle responsible for ensuring that children 15 or younger are properly restrained by a safety belt).

CONNECTICUT

Laws establishing minimum age for rights and responsibilities: Conn. Gen. Stat. Ann. § 53a-73a (West) (child 13, 14, or 15 incapable of consenting to sexual intercourse with person more than 3 years older). *Id.* § 46b-30 (child 15 or younger cannot marry without judicial consent; child 16 or 17 must have parental consent). *Id.* § 29-357 (child 15 or younger may not purchase, sell, possess, or use any fireworks). *Id.* § 19a-285a (child 16 or younger may not donate blood without parental consent). *Id.* § 14-286d (child 15 or younger prohibited from riding bicycle without helmet on public highway). *Id.* § 14-36 (child 15 or younger prohibited from driving motor vehicle, child aged 16 and 17 may drive with learner's

permit when accompanied by licensed adult over 20). *Id.* § 31-25 (child 15 or younger may not operate elevator). *Id.* §§ 31-23, 31-24 (children 15 or younger not permitted to work in hazardous employment and certain other industries). *Id.* § 19a-102a (child 15 or younger may not purchase turtle without parent or guardian authorization). *Id.* § 7-172 (child 15 or younger may not sell or promote sale of bazaar or raffle tickets).

Laws extending extra protection to young adolescents: Conn. Gen. Stat. Ann. § 53a-90a (child 15 or younger protected while using Internet through laws prohibiting enticement or luring via interactive computer service). *Id.* § 53a-86 (enhanced culpability for promoting prostitution where victim is 17 or younger). *Id.* § 14-100a (driver required to ensure all passengers 15 and younger wear seat belt); *see also id.* § 14-272a (penalizing driver who allows child 15 or younger to ride in open bed of truck without appropriate safety belt). *Id.* § 17a-201a (child 15 or younger may not be committed to community correctional center or almshouse).

DELAWARE

Laws establishing minimum age for rights and responsibilities: Del. Code. Ann. tit. 11, § 761 (West) (child 15 or younger incapable of consent to sexual act with person more than 4 years older). *Id.* tit. 13, § 709 (child 16 or younger may not donate blood without parental permission). *Id.* tit. 21, § 2710

(child 15 or younger cannot drive; 16-year-old eligible for learner's permit only). *Id.* tit. 21, § 4198O (child 15 and younger are required to wear bicycle helmets when operating personal assistive mobility devices). *Id.* tit. 14, § 2702 (child 15 and younger must attend school). *Id.* tit. 19, § 506 (child 15 and younger prohibited from certain hazardous occupations and hours of employment). *Id.* tit. 24, § 5107 (child 15 and younger prohibited from enrolling in any school of cosmetology, barbering, electrology, or nail technology). *Id.* tit. 18, § 2707 (child 14 and younger prohibited from contracting for annuities or insurance; child 15 and older may do so only with parental consent, unless emancipated).

Laws extending extra protection to young adolescents: Del. Code. Ann. tit. 11, § 783 (taking or enticing child 17 or younger from custody of parents punishable as kidnapping). *Id.* tit. 11, § 1112A (children 15 and younger protected from in-person sexual solicitation of a child). *Id.* tit. 11, §§ 764, 765 (enhanced penalty for indecent exposure when in presence of child 15 or younger). *Id.* tit. 11, § 1365 (making it a crime to give or sell obscene literature or visual material to a child 16 or younger). *Id.* tit. 21, § 4177 (enhanced penalties for driving under influence of alcohol or drugs when child 16 or younger in car). *Id.* tit. 21, § 4803 (penalizing driver of car when child 15 or younger does not wear seat belt). *Id.* tit. 24, § 1769B (children 15 and younger must have a third party adult present when undergoing a medical examination involving the breasts, genitalia, or

rectum, or when they are partially disrobed during the examination). *Id.* tit. 11, § 4204A (children 15 and younger protected from incarceration with adults).

DISTRICT OF COLUMBIA

Laws establishing minimum age for rights and responsibilities: D.C. Code §§ 22-3001, 22-3008, 22-3009 (West) (child 15 or younger incapable of consent to sexual activity, except with persons less than 4 years older). *Id.* §§ 46-403, 46-411 (child 15 or younger incapable of consenting to marriage; child 16 or 17 may do so only with parental consent). *Id.* § 7-1531.03 (child 15 or younger cannot consent to organ donation, unless emancipated). *Id.* § 2-1542, 2-1543 (children 16 and younger subject to mandatory curfew). *Id.* § 50-1605 (children 15 and younger required to wear bicycle helmets; parents may be fined for violation). *Id.* § 50-1401.01 (child 15 or younger cannot drive; 16-year-old eligible for learner's permit only), *amended in nonpertinent part by* 2011 D.C. Legis. Serv. 19-21 (Act 19-98, approved July 22, 2011, eff. Sept. 14, 2011). *Id.* § 32-202 (limiting hours that 14- or 15-year-olds may work, and to lesser extent, limiting hours that 16- and 17-year-olds may work); *id.* § 32-204 (children 15 and younger prohibited from employment in occupations involving power machinery).

Laws extending extra protection to young adolescents: D.C. Code §§ 22-3001, 22-3008 to 22-3011 (children 15 and younger protected from

sexual contact with persons at least 4 years older through various crimes criminalizing such contact regardless of consent). *Id.* § 22-1312 (crime to make obscene or indecent sexual proposal to child 17 or younger). *Id.* § 22-2201 (crime to provide children 16 and younger with offensive sexual material). *Id.* § 50-1802 (if vehicle has more passengers than seat belts, driver shall insure that children 15 and younger have preference to positions with seat belts).

FLORIDA

Laws establishing minimum age for rights and responsibilities: Fla. Stat. Ann. §§ 794.05, 800.04 (West) (child 15 or younger may not consent to sexual activity; unemancipated child 16 or 17 may not consent to sexual activity with a person 24 or older). *Id.* § 741.0405 (child 15 or younger may not get married, with limited exception that judge may issue license for child who is pregnant or has given birth; child 16 or 17 may not marry without written notarized parental consent, unless parents are deceased or child has been married previously). *Id.* § 743.06 (child 16 or younger not eligible to consent to donation of his blood or tissue without parental consent). *Id.* § 316.2065 (bicycle rider or passenger 15 or younger must wear helmet). *Id.* §§ 322.05, 322.16 (child 14 or younger prohibited from driving; 15-year-old eligible for learner's permit only; 16- or 17-year-old subject to limitations on hours and circumstances under which he or she may drive). *Id.* §§ 316.2068, 316.2074, 261.20, 316.211 (children 15

and younger required to wear helmets and other appropriate safety gear when riding on or operating all-terrain vehicle, off-highway vehicle, electric assistive mobility device, or moped). *Id.* § 316.2085 (child 15 or younger may not operate motorized bicycle or motorcycle with more than 150 cc engine and may not rent a motorcycle or moped). *Id.* § 1003.21 (children age 6 to 15 must attend school). *Id.* § 450.061 (child 15 or younger barred from working in wide range of occupations and industries, including meat packing, power-operated laundry, power-operated baking, dry cleaning, spray painting, alligator wrestling, door-to-door sales except for non-profit organization such as the Boy Scouts or Girl Scouts of America, elevator repair, working with meat and vegetable slicing machines, and working in meat freezers or coolers, with limited exceptions); *see also id.* § 450.081 (regulating and restricting work hours for children 15 and younger and, to lesser extent, children 16 and 17). *Id.* § 476.114 (child 15 or younger ineligible to be licensed as barber). *Id.* § 627.406 (child 14 or younger at nearest birthday not competent to contract for life, health, property, or other insurance). *Id.* § 48.031 (child 14 or younger not competent to receive service of process for another person residing at child's residence in that person's absence); *see also* Fla. R. Civ. P. Rule 1.080; Fla. R. Crim. P. Rule 3.030, Fla. R. Juv. P. Rule 8.085 (same). Fla. Stat. Ann. § 381.0075 (child 15 or younger may not undergo body piercing unless accompanied by parent or guardian; child 16 or 17 must have written notarized parental consent). *Id.* § 877.04 (body of child 17 or younger shall not be

tattooed without written notarized consent by parent or legal guardian). *Id.* § 548.069 (child 15 or younger may not attend professional boxing match or other pugilistic exhibition unless accompanied by adult).

Laws extending extra protection to young adolescents: Fla. Stat. Ann. § 784.048 (enhanced penalties for stalking or cyberstalking of child 15 or younger). *Id.* § 800.04 (protecting children 15 and younger from sexual contact with older persons through variety of restrictions on such contact). *Id.* § 794.05 (protecting children aged 16 and 17 from sexual activity with adults 24 and older, unless child has had disabilities of nonage removed). *Id.* § 810.145 (enhanced penalties for video voyeurism offense involving certain adult offenders where victim is child 15 or younger). *Id.* § 827.04 (person 21 or older who impregnates child 15 or younger commits act of child abuse regardless of consent and in addition to separately-charged offense under Fla. Stat. Ann. § 800.04). *Id.* § 742.107 (girl 15 or younger who gives birth to child must reveal identity of father and cooperate with paternity testing to facilitate criminal prosecution of individuals age 21 or older). *Id.* §§ 92.53, 92.54 (child witness or victim who is 15 years old or younger may provide videotaped testimony or testify via closed-circuit television in lieu of testifying in open court where there is a substantial likelihood that child would otherwise suffer at least moderate emotional or mental harm.) *Id.* §§ 92.55, 914.16, 918.16 (authorizing additional protections for child witnesses aged 15 or younger); *see also* Fla. R.

Crim P. 3.220, Fla. R. Juv. P. 8.060 (same). *Id.* § 918.0155 (special provision for expeditious handling of criminal cases involving allegations of child abuse or unlawful sexual contact with child 15 or younger). *Id.* § 316.614 (unlawful to operate motor vehicle unless passengers 17 and younger wear safety belt or child restraint device). *Id.* § 784.05 (felony offense for individual to negligently leave loaded firearm within reach or easy access of child 15 or younger, where child obtains firearm and uses it to inflict injury or death upon himself or another, with some limited exceptions). *Id.* § 847.013 (protecting children 17 and younger from motion pictures or similar presentations harmful to minors by imposing criminal liability on person who knowingly exhibits or rents to child 17 or younger a movie or videocassette depicting nudity or certain sexual conduct). *Id.* § 985.265 (children 17 or younger confined in an adult detention facility must be kept physically separated from adult detainees and may have no sight or sound contact with adult detainees).

GEORGIA

Laws establishing minimum age for rights and responsibilities: Ga. Code Ann. § 16-6-3 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* § 19-3-2 (child 15 or younger may not marry; child 16 or 17 may not marry without parental consent). *Id.* § 44-5-89 (child 16 or younger ineligible to donate blood without parental consent). *Id.* § 44-5-142 (child 15 or younger ineligible to make anatomical

gift, unless emancipated); *cf. id.* §§ 15-11-200 to 15-11-202 (child 15 or younger ineligible for emancipation). *Id.* § 40-6-296 (child 15 or younger must wear helmet when riding bicycle). *Id.* § 40-5-24 (child 14 or younger may not drive; 15-year-old eligible for instruction permit only). *Id.* § 20-2-690.1 (children 15 and younger must attend school). *Id.* §§ 39-2-1, 39-2-2 (child 15 or younger prohibited from working in any mill, factory, laundry, manufacturing establishment, workshop, or any occupation designated hazardous by Commissioner of Labor as being dangerous to life and limb or injurious to health or morals of child); *see also id.* § 34-13-12 (child 15 or younger prohibited from operating carnival rides); *id.* §§ 39-2-3 to 39-2-6 (limiting work hours for children 15 and younger). *Id.* § 43-7-11 (child 15 or younger ineligible for license to practice barbering); *id.* §§ 43-10-9, 43-26-36 (child 16 or younger ineligible for cosmetology, hair design, practical nursing license). *Id.* § 33-24-5 (children 14 years 6 months or younger may not contract for insurance).

Laws extending extra protection to young adolescents: Ga. Code Ann. § 16-6-22.1 (enhanced penalty for sexual battery of child 15 or younger). *Id.* § 16-6-5 (protecting children 15 and younger from enticement for indecent purposes). *Id.* § 16-6-4 (protecting children 15 and younger from molestation, from exposure to indecent or immoral acts, and from images of such acts). *Id.* § 17-3-2.1 (for enumerated crimes against children 15 and younger, statute of limitations does not begin to run until child reaches age of 16 or offense is reported to the authorities, whichever is earlier). *Id.* § 17-8-54 (protecting

children 15 or younger in sex offense cases by clearing courtroom during child's testimony).

HAWAII

Laws establishing minimum age for rights and responsibilities: Haw. Rev. Stat. §§ 572-1, 572-2 (unlawful for child 14 or younger to marry under any circumstances; 15-year-old child may marry with approval from family court judge and parental consent; child 16 or 17 may do so with parental consent only). *Id.* § 334-60.1 (child 14 or younger may be admitted at psychiatric facility by parent or guardian without child's consent). *Id.* § 327-4 (child incapable of consenting to donate organs unless emancipated or old enough to apply for driver's license); *cf. id.* § 286-102.6 (child 16 or older may apply for provisional driver's license). *Id.* § 291C-150 (child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 286-102.6, 286-110 (child 14 or younger cannot drive; child 15 years 6 months eligible for instruction permit only; child 16 eligible for provisional license only). *Id.* §§ 291C-195, 200-37 (child 14 or younger prohibited from driving mopeds on public roads or operating thrill crafts). *Id.* § 134-5 (child 15 or younger may only hunt with a gun while accompanied by an adult). *Id.* § 302A-1132 (children 17 or younger must attend school). *Id.* § 390-2 (regulating employment and labor by all children 17 and younger with greater restrictions on children 14 and 15). *Id.* §§ 438-7, 439-12 (children 16 or younger ineligible for barber's license; children 15 or younger ineligible for cosmetology

license). *Id.* § 432:2-201 (child 14 or younger ineligible for membership in fraternal benefit societies). *Id.* § 121-1 (child 16 or younger prohibited from membership in state militia). *Id.* § 431:10-203 (children 14 years 6 months or younger prohibited from contracting for insurance).

Laws extending extra protection to young adolescents: Haw. Rev. Stat. §§ 707-730, 707-732 (children 15 and younger protected from sexual contact with older persons through various crimes criminalizing such contact because they are incapable of consent). Haw. R. Evid. 804 (statements of children 15 and younger regarding sexual abuse permitted as evidence if child is unavailable as witness). Haw. R. Evid. 616 (protecting child victim of sexual offense 17 or younger from emotional distress and impairment of ability to communicate by allowing child to testify in criminal prosecution via two-way closed-circuit television). Haw. Rev. Stat. § 291-11.6 (providing penalty for operating motor vehicle with child 8 to 14 not wearing seat belt). *Id.* § 291E-61 (enhancing penalty for operating a vehicle while intoxicated with child 14 or younger in vehicle). *Id.* § 577-18 (protecting children 15 or younger by punishing parent or guardian for allowing child to remain unaccompanied by adult in public between 10 p.m. and 4 a.m.). *Id.* § 134-10.5 (protecting children 15 or younger from firearms by prohibiting storage of firearm in location where child could gain access without parental permission).

IDAHO

Laws establishing minimum age for rights and responsibilities: Idaho Code Ann. § 18-1506 (West) (child 15 or younger incapable of consent to sexual activity with any person over 18). *Id.* § 18-1508A (child aged 16 or 17 incapable of consent to sexual activity with person 5 or more years older). *Id.* § 32-202 (child 15 or younger may not marry unless parents consent and judge satisfied that both parties are capable of assuming full marital duties; child 16 or 17 may not marry without parental consent). *Id.* § 39-3701 (child 16 or younger ineligible to donate blood without parental consent). *Id.* § 39-3404 (child 15 or younger incompetent to make decision to donate organs unless emancipated minor; child 15 to 17 may not make such decision without written parental consent). *Id.* § 18-1523 (child 14 to 17 may not obtain tattoo or body piercing without parental consent). *Id.* § 46-307 (child aged 14 and a half to 17 and a half eligible for training instruction and temporary driving permit); *see also id.* § 46-307A (child aged 14 or 15 eligible for limited school attendance driving permit only if no school bus service available). *Id.* § 33-202 (children between the ages of 7 and 15 must attend school). *Id.* § 44-1304 (no child 15 or younger may be employed for more than 9 hours in a day or 54 hours in a week, or before 6 a.m. or after 9 p.m.). *Id.* § 37-3102 (information concerning the drug treatment of any person aged 16 or older will not be disclosed to a parent or legal guardian without consent). *Id.* § 41-1807 (child 14 or younger not competent to contract

for life, health, or property insurance). *Id.* § 16-2428 (in the pursuance of mental health services, no person may disclose confidential statements made by a child over 14 to the child's parents or others without the child's written permission, unless such information is needed for a treatment plan or required by a court of law).

Laws extending extra protection to young adolescents: Idaho Code Ann. § 18-1508 (protecting children 15 and younger from subjection to lewd or lascivious conduct). *Id.* § 18-1508A (protecting children 16 and 17 from sexual contact with any person at least 5 years older). *Id.* § 18-1509 (protecting children 15 and younger from solicitation). *Id.* § 18-1509A (protecting children 15 and younger from solicitation over Internet). *Id.* § 6-1701 (tort action may be bought against any person who has committed lewd or lascivious acts on child 15 or younger). *Id.* § 18-3308 (crime to sell or give explosives, most types of ammunition, or firearms to any child 15 or younger without written parental consent).

ILLINOIS

Laws establishing minimum age for rights and responsibilities: 720 Ill. Comp. Stat. Ann. 5/12-15 (West) (child 16 or younger incapable of consent to sexual activity). 750 Ill. Comp. Stat. Ann. 5/203, 5/208 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). 210 Ill. Comp. Stat. Ann. 15/1 (child 15 or

younger incapable of donating blood; 16-year-old requires parental consent). 625 Ill. Comp. Stat. Ann. 5/6-103 (child 14 or younger cannot drive; 15-year-old eligible for instruction permit only). 625 Ill. Comp. Stat. Ann. 40/5-3 (child 15 or younger may not operate snowmobile on public highway without parental supervision; children aged 12 to 15 may only operate snowmobile when accompanied by parent or parental designee who is at least 16). 105 Ill. Comp. Stat. Ann. 5/26-1 (children between the ages of 7 and 17 must attend school). 820 Ill. Comp. Stat. Ann. 205/1, 205/13, 205/7 (limiting hours and occupations that 14- or 15-year-old permitted to work). 225 Ill. Comp. Stat. Ann. 85/9, 320/3, 410/2-2, 410/3-2, 410/3A-2, 410/3C-2 (child 15 or younger ineligible to be licensed as a pharmacy technician, plumber's apprentice, barber, cosmetologist, aesthetician, or nail technician). 215 Ill. Comp. Stat. Ann. 5/242, 5/287.1 (child 14 or younger incapable of contracting for insurance or joining fraternal benefit society).

Laws extending extra protection to young adolescents: 720 Ill. Comp. Stat. Ann. 5/10-5.1 (children 14 and under protected while using Internet by creation of felony relating to use of electronic communications to lure children). *Id.* 5/11-9.1 (children 16 and younger protected from criminal child exploitation). 625 Ill. Comp. Stat. Ann. 5/11-501 (enhanced penalty for driving while intoxicated when child 15 or younger in car). 720 Ill. Comp. Stat. Ann. 5/12-10 (children 17 and younger protected from tattoos outside the practice of medicine). 720 Ill.

Comp. Stat. Ann. 555/1 (child 16 or younger subject to curfew laws prohibiting presence in public places and establishments during nighttime hours). 730 Ill. Comp. Stat. Ann. 5/5-8-6 (children 16 and younger protected from placement in adult correctional facility); *see also* 705 Ill. Comp. Stat. Ann. 405/5-410 (children 16 or younger confined in an adult detention facility while awaiting adjudication must be kept physically separate from adult detainees and may have no sight or sound contact with adult detainees).

INDIANA

Laws establishing minimum age for rights and responsibilities: Ind. Code Ann. § 35-42-4-9 (West) (children 14 and 15 incapable of consent to sexual activity with persons 18 or older). *Id.* §§ 31-11-1-5, 31-11-1-6, 31-11-2-1 to 31-11-2-3 (child 16 or younger incapable of contracting for marriage, except with judicial consent in case of pregnancy when both male and female are at least 15; child aged 17 may not marry without parental consent). *Id.* § 22-11-14-8 (child 15 or younger may not sell fireworks). *Id.* § 16-36-1-3 (child 16 or younger may not donate blood). *Id.* § 29-2-16.1-3 (child 15 or younger incapable of making anatomical gift decision unless emancipated minor). *Id.* §§ 9-24-3-2.5, 9-24-7-1 (child 14 or younger cannot drive; child aged 15 eligible for learner's permit; child aged 16 and 180 days eligible for driver's license). *Id.* §§ 31-37-3-2, 31-37-3-3 (children 14 and younger subject to curfew; prohibited from being in a public place between 11 p.m. and 5 a.m. on any

day; children 15 to 17 also prohibited except that they may be in a public place until 1 a.m. on Saturday or Sunday). *Id.* § 20-33-3-31 (children 14 and younger cannot be employed, with exceptions for certain agricultural work and limited work outside school hours). *Id.* § 20-33-3-22 (limiting hours 14- and 15-year-olds are permitted to work). *Id.* § 25-8-12.1-3 (child 16 or younger ineligible to be licensed as a barber; person aged 17 must have graduated high school to obtain license). *Id.* § 25-28.5-1-18.1 (child 16 or younger ineligible to be registered as an apprentice plumber). *Id.* § 27-1-12-15 (child 15 or younger incapable of contracting for insurance). *Id.* § 27-11-3-1 (child 14 or younger incapable of joining fraternal benefit society). *Id.* § 25-8-15.4-15 (children 15 and younger must be accompanied by a parent when using a tanning device at a tanning facility). *Id.* § 22-15-7-8 (child 15 or younger cannot operate regulated amusement device). Ind. Const. art. 12, § 1 (children 16 and younger not included in state militia).

Laws extending extra protection to young adolescents: Ind. Code Ann. § 35-42-4-4 (elevating punishment for possession of child pornography when child depicted is 15 or younger). *Id.* § 35-42-4-5 (protecting children 15 or younger from vicarious sexual gratification). *Id.* § 35-42-4-6 (children 15 and younger protected from solicitation of sexual acts, with elevated punishments when solicited using a computer). *Id.* § 9-19-11-3.6 (failure of vehicle operator to restrain child 15 or younger but older than 8 constitutes traffic violation). *Id.* § 35-42-2-1

(enhancing penalties for domestic battery if committed in presence of child 15 or younger). *Id.* § 35-42-2-1.3 (enhancing penalty for domestic battery when committed in presence of child 15 or younger). *Id.* § 11-10-2-10 (delinquent child 16 or younger may not be transferred to adult facility). *Id.* § 11-13-3-4 (parole board may require released sex offender to avoid contact with children 15 and younger absent board approval or completion of specified treatment program).

IOWA

Laws establishing minimum age for rights and responsibilities: Iowa Code Ann. § 709.4 (West) (child 14 or 15 incapable of consent to sex, except with person less than 4 years older). *Id.* § 595.2 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent and judicial approval), *invalidated in part on other grounds by Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). *Id.* § 599.6 (child 15 or younger incapable of donating blood; 16-year-old may do so with parental consent). *Id.* §§ 321.177, 321.180B (children 16 and under ineligible for full driver's license); *see also id.* § 321G.9 (child 15 or younger must be under direct adult supervision to operate snowmobile on public highway). *Id.* § 299.1A (child 6 to 15 must attend school). *Id.* § 232.11 (child 15 or younger incompetent to waive right to counsel when questioned by peace officer or probation officer without written parental consent). *Id.* §§ 92.5, 92.6 (child 14 or 15 years old may only be employed in certain

occupations); *see also id.* § 92.7 (limiting hours child 15 or younger permitted to work). *Id.* § 15H.5 (child 15 or younger ineligible for Iowa summer youth corps project that uses AmeriCorps funding). *Id.* §§ 92.2, 92.10 (child aged 10 to 15 prohibited from street occupations or migratory labor without work permit). Iowa Admin. Code rr. 185-4.25, 185-17.5 (child 15 or younger may not sell beer or wine or serve liquor). *Id.* r. 441-109.6 (child 15 or younger may not work in day care center). *Id.* rr. 641-46.5, 875-62.18 (child 15 or younger not permitted to operate tanning bed or kiddie ride at amusement park). *Id.* r. 111-9.2 (child 15 or younger not eligible for enrollment in adult orientation and adjustment center for the blind). Iowa Code Ann. § 633.280 (child 15 or younger incompetent to be attesting witness to will). *Id.* § 512B.7 (child 14 or younger may not join fraternal benefit society). *Id.* § 533.309 (child 15 or younger may not vote at credit union member meetings).

Laws extending extra protection to young adolescents: Iowa Code Ann. § 205.9 (crime to sell any poison to child 15 or younger). *Id.* § 710.10 (child 15 or younger protected from crime of enticement). *Id.* § 356.16 (child 15 or younger may not be imprisoned at hard labor). *Id.* §§ 232.22, 356.3 (children 14 to 17 confined in an adult detention facility while awaiting trial must be kept entirely separate from adult detainees).

KANSAS

Laws establishing minimum age for rights and responsibilities: Kan. Stat. Ann. § 21-5507 (West) (child 15 or younger incapable of consent to sex except with spouse if married). *Id.* § 23-106 (child 14 or younger ineligible for marriage license; 15-year-old eligible for marriage license with judicial authorization only; child 16 or 17 eligible for marriage license only with parental consent). *Id.* § 38-123a (child 15 or younger may not donate blood without parental consent). *Id.* § 65-3223 (child 15 or younger incapable of consenting to donate organs, unless emancipated). *Id.* § 38-123b (child 15 or younger not authorized to consent to hospital, medical, or surgical treatment or procedures without parental consent). *Id.* § 8-237 (child 16 or younger ineligible for driver's license; children 15 and 16 may apply for instruction permit). *Id.* § 38-603 (limiting work hours for 14- and 15-year-olds); *id.* § 38-602 (prohibiting child 17 or younger from working in trade injurious to life, health, safety, morals, or welfare of the child). *Id.* § 72-1111 (child 17 or younger must attend school).

Laws extending extra protection to young adolescents: Kan. Stat. Ann. §§ 21-5504, 21-5506, 21-5508, 21-5509 (children 14 and 15 protected from sodomy, lewd touching, sexual intercourse, indecent solicitation, and electronic solicitation). *Id.* § 21-5510 (children 17 and younger protected from sexual exploitation). *Id.* § 21-5513 (enhancing penalty for lewd and lascivious behavior if committed in front of child 15 or younger). *Id.* § 21-5605 (children 15 and younger

protected from abandonment). *Id.* § 38-2366 (children 15 and younger convicted and sentenced as adults protected from placement in adult correctional facility).

KENTUCKY

Laws establishing minimum age for rights and responsibilities: Ky. Rev. Stat. Ann. § 510.020 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* § 402.020 (child 15 or younger incapable of contracting for marriage except in case of pregnancy with judicial consent; child 16 or 17 may do so only with parental consent). *Id.* § 227.715 (no sale of fireworks to child 17 or younger). *Id.* § 214.468 (child 15 or younger incapable of donating blood; 16-year-old may do so only with parental consent). *Id.* §§ 186.450, 186.452, 186.454 (child 15 or younger cannot drive; 16-year-old eligible for learner's permit or intermediate license; 17-year-old eligible for full license). *Id.* § 159.010 (child 15 or younger must attend school). *Id.* § 339.230 (child 15 or younger may not be employed during regular school hours unless he or she has graduated from high school). *Id.* § 315.136 (child 15 or younger ineligible for registration as pharmacy technician). *Id.* §§ 304.14-070, 304.29-061 (child 14 or younger incapable of contracting for insurance or adult membership fraternal benefit society). *Id.* § 217.450 (children 14 or younger shall not be sold or given any poisonous medicine without parental consent). *Id.* § 645.030 (child 15 or younger cannot voluntarily admit self to hospital for

treatment of mental illness without parental consent).

Laws extending extra protection to young adolescents: Ky. Rev. Stat. Ann. §§ 510.110, 510.120, 510.060, 510.090 (children 15 and younger protected from sexual contact with older persons through various crimes criminalizing such contact). *Id.* § 509.010 (children 15 and younger protected from kidnapping through provision stating that restraint of such children is "without consent" even where child acquiesces). *Id.* § 454.050 (children 15 and younger excluded from courtroom in civil actions for slander, seduction, or breach of promise of marriage, unless witnesses in the case or next of kin to party); *see also* Ky. R. Crim. P. 9.50 (children 15 and younger may be excluded from courtroom in criminal prosecutions for rape and other sexual offenses, unless witnesses in the case or kin to party).

LOUISIANA

Laws establishing minimum age for rights and responsibilities: La. Rev. Stat. Ann. §§ 14:80, 14:80.1 (West) (child 16 or younger incapable of consenting to sex with person 17 or older, unless age difference less than two years). La. Child. Code Ann. art. 1545 (child 15 or younger may not marry without consent of both parents and judge; child 16 or 17 may not marry without consent of either parents or judge). La. Rev. Stat. Ann. § 51:654 (sale of fireworks to child 14 or younger prohibited). *Id.* § 40:1097 (children 16

and younger may not consent to blood donation without consent of parent or guardian). *Id.* § 32:405.1 (child 16 or younger cannot obtain driver's license). *Id.* § 32:402.1 (children 14 or younger cannot participate in any driver education course or driver training program). *Id.* § 23:163 (children 15 or younger are not permitted to work in connection with a billiard room, with power-driven machinery, with manufacturing, processing, or distribution of goods, or in close proximity to a place where alcoholic beverages are sold).

Laws extending extra protection to young adolescents: La. Rev. Stat. Ann. § 14:81.2 (protecting children 16 or younger from molestation by person more than 2 years older). *Id.* § 14:81 (protecting children 16 or younger on the Internet by punishing lewd and lascivious acts or electronic transmissions by persons more than 2 years older). *Id.* § 14:91.13 (penalizing the use or possession of illegal drugs by any adult in the presence of children 16 or younger). *Id.* §§ 14:93, 14:93.2.3 (protecting children 16 or younger from cruelty and criminal neglect). *Id.* § 15:469.1 (providing for closed chambers testimony by victim in criminal prosecution for certain sex offenses where victim is child 15 or younger).

MAINE

Laws establishing minimum age for rights and responsibilities: Me. Rev. Stat. Ann. tit. 17-A, § 254 (West) (child 14 or 15 may consent to sexual

activity only with persons less than 5 years older). *Id.* tit. 19-A, § 652 (child 15 or younger incapable of contracting for marriage without parental and judicial consent). *Id.* tit. 22, § 1502-A (child 16 or younger incapable of consenting to give blood). *Id.* § 2944 (child 15 or younger incapable of consent to donate organs, unless emancipated minor); *cf. id.* tit. 15, § 3506-A (child 15 or younger ineligible for emancipation). *Id.* tit. 29-A, § 2323 (child 15 or younger required to wear helmet when riding bicycle). *Id.* §§ 1251, 1256, 1304 (children 14 and younger cannot drive; 15-year-old eligible for learner's permit or restricted license only). *Id.* tit. 20-A, § 5001-A (child 16 or younger must attend school). *Id.* tit. 26, § 775 (child 15 or younger may not be employed without work permit signed by superintendent of school district); *see also id.* §§ 771, 774 (limiting work hours and permissible occupations for children 15 and younger). *Id.* tit. 32, §§ 1231-A, 14226 to 14229 (child 16 or younger ineligible to be registered as electrologist, cosmetologist, barber, aesthetician, or manicurist); *see also id.* § 14233 (child 15 or younger ineligible to be licensed as barbering or cosmetology student). *Id.* tit. 24-A, §§ 2407, 4110 (child 14 or younger incapable of contracting for life insurance or joining fraternal benefit society). *Id.* tit 12, § 6505-A (child 14 or younger may not fish or take elvers). *Id.* tit. 17, § 319 (children 15 or younger prohibited from playing bingo).

Laws extending extra protection to young adolescents: Me. Rev. Stat. Ann. tit. 17-A, §§ 254,

255-A (children 15 and younger protected from sexual contact and abuse by older persons through various statutes criminalizing such contact regardless of consent). *Id.* tit. 22, § 1549 (smoking in vehicle prohibited when child 15 or younger present). *Id.* tit. 15, § 1205 (hearsay statement of child 15 or younger describing sexual contact admissible as evidence in criminal prosecution, if child would be harmed by testifying in open court and statement made in presence of judicial officer and subject to cross-examination). *Id.* tit. 17-A, § 8 (no statute of limitations for certain sex offenses against child 15 or younger).

MARYLAND

Laws establishing minimum age for rights and responsibilities: Md. Code Ann., Crim. Law §§ 3-307, 3-308 (West) (children 15 and younger cannot consent to sexual activity, except with persons less than 4 years older). Md. Code Ann., Fam. Law § 2-301 (child 14 or younger may not marry; child 16 or 17 may do so with either parental consent or medical certification of pregnancy; child 15 may do so only with parental consent and medical certification of pregnancy). Md. Code Ann., Pub. Safety § 10-112 (sale of sparklers or sparkling devices to child 15 or younger prohibited). Md. Code Ann., Health-Gen. § 20-101 (child 15 or younger may not donate blood; 16-year-old may do so only with parental consent). Md. Code Ann., Transp. § 21-1207.1 (children 15 and younger required to wear helmets when riding bicycles). *Id.* § 16-103 (child younger than 15 years 9

months cannot drive; child 15 years 9 months old eligible for learner's permit only; child 16 years 6 months old eligible for provisional license). Md. Code Ann., Educ. § 7-301 (children 15 and younger must attend school). Md. Code Ann., Lab. & Empl. § 3-211 (limiting hours 14- and 15-year-olds are permitted to work). *Id.* § 3-213 (child 14 or 15 prohibited from working in certain hazardous occupations).

Laws extending extra protection to young adolescents: Md. Code Ann., Crim. Law §§ 3-303, 3-305 (elevating maximum punishments for first degree rape and first degree sexual offense to life without parole if committed while kidnapping child 15 or younger). *Id.* § 3-503 (children 15 and younger protected from child kidnapping). *Id.* § 11-305 (children 15 or younger are protected from adults luring them from their homes or keeping them hidden from their parents for the purpose of committing sexual acts). Md. Code Ann., Transp. § 22-412.3 (penalizing driver of car when child 15 or younger does not wear seat belt). Md. Code Ann., Crim. Law §§ 11-303, 3-602, 1-101 (children 17 and younger who are victims of sexual abuse may testify by closed-circuit television upon a finding by the court). Md. Code Ann., Cts. & Jud. Proc. § 3-8A-22 (children 17 and younger who are not prosecuted as adults may not be housed in adult detention facilities).

MASSACHUSETTS

Laws establishing minimum age for rights and responsibilities: Mass. Gen. Laws Ann. ch.

265, § 23 (West) (child 15 or younger incapable of consenting to sexual intercourse); *cf. Commonwealth v. Smith*, 728 N.E.2d 272, 276 (Mass. 2000) (noting, despite possible ambiguity in statute, that lack of consent conclusively presumed by law for child of such age). Mass. Gen. Laws Ann. ch. 111, § 184C (child 15 or younger ineligible to donate blood; 16-year-old may not donate blood without parental consent). *Id.* ch. 113, § 8 (child 17 or younger incompetent to make decision to donate organs at death). *Id.* ch. 85, § 11B (child 16 or younger operating bicycle or being carried as passenger must wear helmet). *Id.* ch. 207, §§ 7, 24, 25 (child 17 or younger incapable of contracting for marriage without parental consent and judicial order). *Id.* ch. 90, §§ 8, 8B (child 15 or younger cannot drive; 16-year-old may apply for learner's permit; child 16 and a half but not yet 18 eligible for restricted junior operator's license upon meeting certain requirements). *Id.* ch. 23, § 11H (child 15 and younger ineligible to enter into apprentice agreement). *Id.* ch. 149, § 60 (no person shall employ child age 15 or younger, subject to limited exceptions). *Id.* ch. 176, § 9 (child 14 or younger not to be admitted into fraternal benefit society). *Id.* ch. 111, § 211 (children 14 to 17 may not use tanning device without written consent of parent).

Laws extending extra protection to young adolescents: Mass. Gen. Laws Ann. ch. 265, § 23 (protecting children 15 and younger from sexual intercourse or abuse). *Id.* ch. 265, § 23A (enhancing penalties for sexual abuse of a child aged 12 to 15

when offender is at least 10 years older). *Id.* ch. 265, § 24B (protecting children 15 and younger from assault with intent to commit rape). *Id.* ch. 265, § 26 (enhancing penalties for kidnapping when victim is child 15 or younger). *Id.* ch. 265, § 26C (protecting children 15 and younger from enticement). *Id.* ch. 90, § 24V (driving while intoxicated with child passenger 14 or younger constitutes child endangerment and grounds for revocation of license). *Id.* ch. 278, § 16D (child 14 or younger who is witness or victim in criminal case protected through provision authorizing child's videotaped testimony if found that child would suffer from trauma by testifying in live court), *amended in nonpertinent part by* 2011 Mass. Legis. Ch. 178 (H.B. 3808, approved Nov. 21, 2011).

MICHIGAN

Laws establishing minimum age for rights and responsibilities: Mich. Comp. Laws Ann. § 750.520d (West) (child 15 or younger incapable of consent to sexual activity). *Id.* § 551.51 (child 15 or younger incapable of contracting for marriage). *Id.* § 333.9122 (child 15 or younger may not donate blood, child 16 years old may donate with parental consent). *Id.* § 333.10104 (child 15 or younger may not make decision to donate organs unless emancipated). *Id.* § 333.13102 (child 17 or younger not permitted to obtain tattoo or body piercing without parental consent). *Id.* § 257.310e (child under 14 years 9 months cannot drive; child 16 or younger eligible only for graduated licenses). *Id.* § 380.1561 (children between

6 and 17 must attend school). *Id.* § 409.110 (limiting hours child 15 or younger permitted to work). *Id.* §§ 339.1108, 339.1207 (child 16 or younger ineligible to be licensed as barber or cosmetologist). *Id.* § 722.752 (establishing curfew for children 15 and younger). *Id.* § 500.2205 (child 15 or younger incapable of contracting for life insurance). *Id.* § 710.43 (child 14 or younger may be adopted without his or her consent).

Laws extending extra protection to young adolescents: Mich. Comp. Laws Ann. § 750.145a (children 15 and younger protected from immoral enticement and solicitation). *Id.* §§ 750.520b to 750.520e (children 13, 14, and 15 protected from sexual contact with older persons through various statutes criminalizing such contact regardless of consent). *Id.* § 257.625 (enhanced penalty for operation of motor vehicle under influence of alcohol or controlled substance when child 15 or younger in car). *Id.* § 600.2163a (child 15 or younger who is victim of abuse or sex crime protected through provision authorizing victim's videotaped deposition to be used for pretrial proceedings, impeachment purposes, sentence determination, or factual basis for a no contest plea or to supplement a guilty plea); *see also id.* (child witness may sit with designated "support person" during testimony). *Id.* § 764.27a (children 17 and younger confined in an adult detention facility while awaiting trial must be held physically separate from adult detainees).

MINNESOTA

Laws establishing minimum age for rights and responsibilities: Minn. Stat. Ann. §§ 609.342, 609.343, 609.345 (West) (child who is 13, 14, or 15 incapable of consenting to sexual activity with person more than 48 months older). *Id.* § 517.02 (child 15 or younger incapable of contracting for marriage; child who is 16 or 17 may marry only with parental consent and judicial approval). *Id.* § 624.20 (child 17 or younger prohibited from purchasing fireworks). *Id.* § 145.41 (child 15 or younger not eligible to donate blood; 16-year-old may donate blood only with parental consent). *Id.* § 525A.04 (child 15 or younger not permitted to donate organ unless child is emancipated). *Id.* § 609.2246 (child 17 or younger not permitted to obtain tattoo without parental consent). *Id.* § 171.05 (child 14 or younger may not drive or operate a motorized bicycle). *Id.* § 120A.22 (child 7 to 15 required to attend school). *Id.* § 181A.04 (child 15 or younger may work only for limited hours, child 17 or younger may not work in hazardous occupation).

Laws extending extra protection to young adolescents: Minn. Stat. Ann. §§ 609.342, 609.343, 609.345 (protecting children who are 13, 14, and 15 from sexual contact with older persons though criminalizing of such contact). *Id.* § 609.352 (children 15 and younger protected while using Internet by felonies related to use of computer to solicit or communicate for sexual purposes). *Id.* § 169A.03 (enhanced penalty for driving while impaired by alcohol when child 15 or younger was in vehicle at time of offense

and driver was at least 36 months older than child). *Id.* § 169.686 (penalizing driver of car when child 14 or younger does not wear seat belt). *Id.* § 609.25 (protecting children 15 and younger from kidnapping through provision requiring parental consent for confinement and removal of child).

MISSISSIPPI

Laws establishing minimum age for rights and responsibilities: Miss. Code. Ann. §§ 97-3-65, 97-3-95 (West) (child 14 or 15 incapable of consent to sexual activity with person, not spouse, 36 months older than child). *Id.* § 93-1-5 (female child 14 or younger and male child 16 or younger incapable of obtaining marriage license, with exception for judicial approval). *Id.* § 41-41-15 (child 15 or younger incompetent to consent to donate blood; 16-year-old may not donate blood without parental consent). *Id.* § 63-1-9 (child 14 or younger not permitted to drive; 15-year-old eligible for temporary driving permit; 16-year-old eligible for intermediate license; child 16 years 6 months may receive driver's license if certain special conditions are met). *Id.* § 3-13-91 (children 6 to 16 must attend school). *Id.* § 37-49-5 (child 15 or younger may not contract for educational loan). *Id.* § 71-1-21 (child 14 or 15 employed in mill, cannery, workshop, factory, or manufacturing establishment may work only specified hours not to exceed weekly hour limit). *Id.* §§ 73-7-18, 73-7-53 (child 16 or younger ineligible to be licensed as a wig specialist or aesthetician). *Id.* § 83-29-5 (child 15 or younger prohibited

from having a voice or vote in management of fraternal societies). *Id.* § 33-5-1 (child 16 or younger ineligible for service in state militia). *Id.* § 83-7-19 (child 14 years 6 months or younger cannot contract for life, health, or accident insurance on his or her own life).

Laws extending extra protection to young adolescents: Miss. Code Ann. § 97-3-95 (protecting children 15 and younger from sexual exploitation by older persons and children 17 and younger from sexual exploitation by persons in position of trust or authority over child). *Id.* § 45-33-47 (offender 21 or older convicted of any sex offense where victim was 14 or younger shall be subject to lifetime registration and shall not be relieved of duty to register). *Id.* § 97-5-41 (children 14 through 17 protected from sexual acts with step-parent or adopted parent). *Id.* § 97-1-6 (protecting child 16 or younger from any person 17 or older who directs or causes such child to commit felony). *Id.* § 97-3-53 (protecting children 15 or younger from kidnapping or unlawful seizure). *Id.* § 73-61-1 (unlawful for any person to place tattoo upon body of child 17 or younger). *Id.* § 41-114-1 (smoking prohibited at organized public athletic event involving children 17 and younger). *Id.* § 13-1-407 (children 15 and younger protected from emotional trauma when testifying in child abuse case through provision allowing such testimony via videotaped deposition, with accused abuser required to watch through two-way mirror or other screening device, if substantial likelihood shown that child would suffer traumatic

emotional or mental distress if required to testify in open court).

MISSOURI

Laws establishing minimum age for rights and responsibilities: Mo. Ann. Stat. § 566.034 (West) (child 16 or younger incapable of consenting to sexual intercourse with individual 21 or older). *Id.* § 566.064 (child 16 or younger incapable of consenting to sodomy with individual 21 or older). *Id.* § 451.090 (child 14 or younger cannot obtain marriage license without judicial finding of good cause; child 15 to 17 may do so only with parental consent). *Id.* § 320.151 (child aged 15 or younger cannot sell fireworks or work in a facility where fireworks are sold). *Id.* § 431.068 (child 15 or younger not eligible to donate blood; 16-year-old requires parental consent). *Id.* § 194.220 (child 15 or younger incapable of making anatomical gift decision). *Id.* § 167.031 (mandatory school attendance for children between ages of 7 and 16 unless emancipated). *Id.* § 324.520 (prohibiting tattooing or body piercing of child 17 or younger without parental consent). *Id.* §§ 302.060, 302.130 (child 14 or younger cannot drive; 15-year-old eligible for temporary instruction permit only). *Id.* §§ 294.011, 294.024, 294.030 (child 15 or younger may only work limited hours; children between 14 and 16 may only work during school term pursuant to work permit). *Id.* § 294.040 (child 15 or younger prohibited from being employed in certain hazardous occupations). *Id.* §§ 328.075, 329.050 (child 16 or younger

ineligible to be licensed as barber, cosmetologist, or manicurist). *Id.* § 431.056 (child 15 or younger incompetent to enter into contracts).

Laws extending extra protection to young adolescents: Mo. Ann. Stat. § 566.151 (child 14 or younger protected from enticement for purpose of engaging in sexual conduct by persons 21 or older). *Id.* § 566.083 (child 14 or younger protected from sexual misconduct). *Id.* § 566.068 (child 16 or younger protected from sexual contact). *Id.* §§ 565.149, 565.156 (children 16 and younger protected from child abduction). *Id.* § 568.045 (children 16 and younger protected from endangerment, including manufacturing of methamphetamine in presence of child). *Id.* § 195.212 (child 16 or younger protected from distribution of controlled substance by someone over two years older than child). *Id.* § 573.090 (prohibiting rental or sale of videos that depict morbid violence to children 16 or younger). *Id.* § 307.179 (penalizing driver of car when child 15 or younger does not wear seat belt). *Id.* §§ 491.678, 491.680 (child victim 16 or younger protected by provision authorizing admissibility of child's in-camera videotaped deposition in lieu of live testimony in certain criminal prosecutions). *Id.* § 217.345 (incarcerated children 16 and younger must be kept physically separated from older inmates).

MONTANA

Laws establishing minimum age for rights and responsibilities: Mont. Code Ann. § 45-5-501 (West) (child 15 or younger incapable of consent to sexual activity). *Id.* §§ 40-1-202, 40-1-213 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent and judicial approval). *Id.* § 72-17-201 (child 14 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 41-1-501 (child 15 or younger ineligible for emancipation). *Id.* § 61-5-105 (child 14 or younger cannot receive full driver's license). *Id.* § 20-5-102 (child must attend school until at least his or her 16th birthday). *Id.* §§ 41-2-106 to 41-2-110 (children aged 14 and 15 restricted from occupational positions that require dangerous activities, including agricultural jobs handling poisonous chemicals or occupations related to the use of power-driven machinery; children 17 or younger restricted from employment in certain occupations, including logging, mining, roofing, and meatpacking).

Laws extending extra protection to young adolescents: Mont. Code Ann. §§ 45-5-502, 45-5-503, 45-5-507 (enhanced penalties for sexual offenses against children 15 or younger, subject to close-in-age exceptions). *Id.* § 45-5-627 (children 15 and younger protected from assault, aggravated assault, assault with a weapon, and sexual intercourse without consent committed for any ceremony, rite, or ritual). *Id.* § 45-5-622 (children 15 and younger protected by statute criminalizing endangering welfare of child).

Id. § 41-5-206 (child 15 or younger may not be incarcerated with adults).

NEBRASKA

Laws establishing minimum age for rights and responsibilities: Neb. Rev. Stat. § 28-319 (West) (child 12 to 15 incapable of consent to sexual activity--with person 19 or older). *Id.* §§ 42-102, 42-105 (child 16 or younger incapable of contracting for marriage). *Id.* § 71-4808 (child 16 or younger incapable of consenting to donate blood). *Id.* § 71-4827 (child 15 or younger incapable of consenting to donate organs without parental consent unless emancipated; 16-year-old may consent if authorized to apply for a driver's license). *Id.* §§ 38-1008; 38-10,165 (children 17 and younger cannot obtain body art, defined to include tattoos and body piercings, without parental consent). *Id.* §§ 60-4,118.05, 60-4,120.01, 60-4,123, 60-4,123.01, 60-4,124 (child 16 and younger ineligible for driver's license; 14-year-old eligible for learner's permit or school permit only; 16-year-old eligible for provisional license). *Id.* § 37-1241.06 (child 15 or younger may not operate motorboat with individual in tow). *Id.* § 79-201 (all children under 18 must attend school, except that child 16 or older may unenroll in school with notarized parental permission); *see also id.* § 79-203 (superintendent of school district may issue permit for employment of child 14 or 15 who has completed 8th grade, where employment necessary for child's own support or support of dependents). *Id.* § 79-536 (child aged 6 to 15 may be

required to attend summer school). *Id.* § 48-302 (employment certificate required for children 15 or younger). *Id.* §§ 48-310 to 48-313 (child 15 or younger restricted from working certain hours and from working certain occupations). *Id.* §§ 71-204; 38-1062 (child 16 or younger ineligible to be licensed as barber, cosmetologist, electrologist, aesthetician, body art practitioner, or nail technician). *Id.* § 2-2636 (child 15 or younger may not use pesticides). *Id.* § 55-134 (child 16 or younger ineligible to join Nebraska National Guard).

Laws extending extra protection to young adolescents: Neb. Rev. Stat. § 28-320.01 (children 14 and younger protected from sexual contact with adults). *Id.* § 28-320.02 (children 16 and younger protected from sexual offenses over Internet). *Id.* § 28-311.04 (enhanced penalty for stalking if victim 15 or younger). *Id.* § 28-831 (enhanced penalty for trafficking children 14 or younger). *Id.* § 28-1254 (enhanced penalty for DUI or possession when children 15 or younger are present in the car). *Id.* §§ 29-1925, 29-1926 (child victim or witness to any felony protected through provision authorizing videotaped depositions rather than live testimony in criminal prosecution). *Id.* § 28-728 (requiring videotaped interviews for children 16 or younger who allege sexual or serious physical abuse). *Id.* § 43-250 (children 15 or younger confined in an adult detention facility while awaiting trial must be kept physically separate from adults).

NEVADA

Laws establishing minimum age for rights and responsibilities: Nev. Rev. Stat. Ann. § 200.364 (West) (child 15 or younger incapable of consenting to sexual activity with person 18 or older). *Id.* §§ 122.020; 122.025 (child 15 or younger incapable of contracting for marriage except with parental consent and judicial authorization, to be given in extraordinary circumstances; child 16 or 17 years old capable of marriage only with parental consent). *Id.* § 460.040 (child 16 or younger not eligible to donate blood without parental consent). *Id.* § 451.556 (child 15 or younger incapable of making anatomical gift decision). *Id.* §§ 483.250, 483.2521 to 483.2529, 483.280 (child 15 years 6 months eligible for learner's permit; child 16 or 17 eligible for restricted license only; but child 14 or 15 eligible for restricted license where extenuating circumstances present). *Id.* §§ 392.040, 392.110 (child 17 or younger required to attend school, but child 14 or older may be exempted with board of trustees approval). *Id.* §§ 609.190; 609.200; 609.221 (prohibiting children 15 and younger from working in certain occupations); *see also id.* § 609.240 (limiting hours children 15 and younger permitted to work). *Id.* § 687B.070 (child 15 or younger cannot contract for insurance). *Id.* § 412.026 (child 16 or younger cannot join the Nevada National Guard and is not included in National Guard Reserve). *Id.* § 475.110 (child 15 or younger not subject to mandatory firefighting duty required of able-bodied males 16 to 50).

Laws extending extra protection to young adolescents: Nev. Rev. Stat. Ann. § 200.366 (enhanced penalty for sexual assault if victim 15 or younger). *Id.* § 200.730 (penalty for possession of pornography depicting children 15 and younger). *Id.* § 201.540 (enhanced penalties for teachers who engage in sexual activity with students aged 14 and 15). *Id.* § 484.3795 (aggravated circumstance in conviction for driving under influence of intoxicating liquor if child 14 or younger in car).

NEW HAMPSHIRE

Laws establishing minimum age for rights and responsibilities: N.H. Rev. Stat. Ann. § 571-C:1 (child 15 or younger may not donate blood unless married; child aged 16 may not donate without parental consent, unless married). *Id.* § 265:144 (children 15 and younger must wear helmets when riding bicycles in public roadways). *Id.* § 263:16, 263:19, 263:25 (child under 15 and a half may not drive; child 15 and a half or older may drive with licensed driver while being taught to drive; child 16 or 17 may receive license upon meeting instructional requirements). *Id.* § 193:1 (children 6 to 17 required to attend school). *Id.* § 276-A:4 (child 15 or younger permitted to work only subject to certain restrictions). *Id.* § 167:82 (child 15 or younger exempted from employment requirement for welfare assistance program). *Id.* § 179:19 (child 16 or younger prohibited from working as entertainer in cocktail lounge where liquor or beverages are sold). *Id.* § 313-A:24 (child 15

or younger prohibited from apprenticing as barber, aesthetician, or cosmetologist). *Id.* § 326-C:5 (child 16 or younger unqualified to obtain license for occupational therapy). *Id.* § 31:43-c (child 15 or younger prohibited from any public street after 9 p.m. unless accompanied by parent or guardian). *Id.* § 418:5 (child 14 or younger ineligible to join fraternal benefit society). *Id.* § 313-A:31 (child 17 or younger prohibited from using tanning salon without parental consent). *Id.* § 207:2-a (child 15 or younger prohibited from hunting using firearm, bow and arrow, or crossbow and bolt, except when accompanied by properly licensed adult). *Id.* § 270:30 (child 15 or younger may not operate motorized vessel having power in excess of 25 horsepower on public waters unless accompanied by adult). *Id.* § 605:1 (child 16 or younger required to have counsel and may not plead guilty or go to trial without parental consent).

Laws extending extra protection to young adolescents: N.H. Rev. Stat. Ann. §§ 632-A:2 to 632-A:4 (protecting children who are 13, 14, and 15 years old from sexual activity with older persons). *Id.* § 633:2 (protecting child 15 or younger from being confined and exposed to risk of serious bodily injury without consent of child's parent or guardian). *Id.* § 639:3 (protecting children 15 and younger from being solicited to engage in sexual activity). *Id.* § 645:1 (protecting children age 15 and younger from indecent exposure). *Id.* §§ 649-A:1 to 649-A:3-b (protecting children 17 and younger from being used as subjects of sexual visual images). *Id.* § 265-A:3

(enhanced penalty for driving while intoxicated when carrying passenger 15 or younger). *Id.* § 517:13-a (authorizing use of videotaped testimony of child victim or witness where child was 16 or younger at time of crime). *Id.* § 517:13 (prohibiting discovery deposition of child victim or witness in criminal case where child is 15 or younger). *Id.* § 632-A:8 (in sexual assault prosecution involving child victim age 15 or younger, child's testimony shall be heard in camera unless defendant shows good cause to the contrary). *Id.* § 354-B:2 (where child 16 or younger is civil defendant in civil rights action, special confidentiality provisions apply). *Id.* § 618:6 (children 16 and younger exempt from confinement for nonpayment of fine). *Id.* § 650-C:1 (prohibiting adult from storing firearms where adult knows or should know child age 15 or younger could find them).

NEW JERSEY

Laws establishing minimum age for rights and responsibilities: N.J. Stat. Ann. § 2C:14-2 (West) (child 13 to 15 incapable of consent to sexual activity, except with person within 4 years of own age). *Id.* § 9:17A-6 (child 15 or younger incapable of consenting to donate blood; 16-year-old requires parental consent). *Id.* §§ 39:3-3 to 39:3-42 (child 15 and younger cannot drive; 16-year-old eligible for learner's permit and restricted license only; 17-year-old eligible for provisional license only). *Id.* § 26:6-80 (child incapable of making decision to donate organs unless emancipated or old enough to apply for driver's

license). *Id.* § 39:4-10.1 (child 16 or younger required to wear helmet when riding bicycle). *Id.* § 17B:24-2 (child 14 or younger not competent to contract for life or health insurance). *Id.* § 26:2D-82.1 (child 14 to 17 must have parental consent to use tanning facility). *Id.* § 18A:38-25 (children 6 to 15 must attend school). *Id.* § 2C:40-21 (child 17 or younger may not consent to tattooing or body piercing without parental consent). *Id.* § 34:2-21.2 (limiting hours and types of jobs in which 14- and 15-year-olds may be employed). *Id.* § 34:2-21.15 (special certificate required to employ child 15 and younger in agricultural work). *Id.* § 34:2-21.17 (prohibited occupations for children 15 and younger).

Laws extending extra protection to young adolescents: N.J. Stat. Ann. § 2C:13-1 (enhanced penalty for kidnapping if victim 15 or younger). *Id.* § 2C:24-4 (protecting children 15 and younger from activity by parent or guardian that endangers their welfare or exposes them to inappropriate sexual conduct). *Id.* (protecting children 15 and younger from exploitation through provision criminalizing production or distribution, including Internet distribution, of pornography involving such children). *Id.* § 39:3-76.2f (driver of vehicle responsible for ensuring that children 8 to 17 wear seat belts). *Id.* § 2C:40-21 (crime to tattoo or body-pierce child 17 or younger without parental consent). *Id.* § 2A:84A-32.4 (protecting child witness 16 or younger from severe emotional or mental distress through provision authorizing

testimony of such child via closed-circuit television in criminal prosecution of certain sex crimes).

NEW MEXICO

Laws establishing minimum age for rights and responsibilities: N.M. Stat. Ann. § 30-9-11 (West) (child 16 or younger incapable of consenting to sex with adult over 19, with exception for marriage). *Id.* §§ 40-1-5, 40-1-6 (child 15 or younger incapable of contracting for marriage except with judicial authorization where couple has child or female is pregnant; child 16 or 17 can marry only with parental consent). *Id.* § 60-2C-8 (sale of fireworks to child 15 or younger prohibited). *Id.* § 24-10-6 (child 16 or younger may not donate blood). *Id.* § 24-6B-4 (child 14 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 32A-21-4 (child 15 or younger may not be emancipated). *Id.* § 32A-24-3 (unlawful for parent or guardian to knowingly permit minor 17 and younger to operate bicycle, scooter, or skateboard without protective helmet). *Id.* § 32A-24-4 (person engaged in renting bicycles, scooters, or skateboards shall provide minor 17 or younger with protective helmet). *Id.* § 66-5-5 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit only; child 15 years 6 months eligible only for provisional license). *Id.* § 22-12-2 (child 17 or younger must attend school). *Id.* §§ 50-6-2 to 50-6-4, 50-6-17 (child 14 or 15 ineligible to work in certain hazardous occupations, may work only limited hours, and must have permit to work, with exceptions for employment

by parent, as actor, or to deliver newspapers). *Id.* §§ 61-17A-8, 61-17A-9 (child 16 or younger ineligible to be licensed as barber or cosmetologist). *Id.* §§ 59A-18-7, 59A-44-6 (child 14 or younger incapable of contracting for insurance or adult membership in fraternal benefit society). N.M. R. Ann. 1-004 (child 14 or younger incompetent to accept service of process for another at their residence).

Laws extending extra protection to young adolescents: N.M. Stat. Ann. §§ 30-6A-4, 30-9-1, 30-37-3.2, 30-37-3.3 (children 15 and younger protected from sexual exploitation by prostitution, enticement for sex acts, and sexual solicitation and communication through an electronic device). *Id.* § 66-7-369 (prohibiting operation of most vehicles unless children 17 and younger wear seat belts). *Id.* § 30-3A-3.1 (enhanced punishment for stalking where victim 15 or younger). *Id.* § 30-9-17 (child 15 or younger who is victim of sex crime may testify by videotaped deposition in criminal prosecution).

NEW YORK

Laws establishing minimum age for rights and responsibilities: N.Y. Penal Law § 130.05 (McKinney) (child 16 or younger incapable of consenting to sexual activity). N.Y. Dom. Rel. Law §§ 15, 15-a (child 14 or 15 may marry only with both parental and judicial consent; child 16 or 17 may marry only with parental consent). N.Y. Pub. Health Law § 3123 (child 16 or younger not eligible to donate blood

without parental consent). N.Y. Veh. & Traf. Law § 502 (child 15 or younger not eligible for driver's license; child of 16 eligible for junior license only; child of 17 eligible for license only after successful completion of approved driver education course). N.Y. Educ. Law § 3205 (children between ages of 6 and 16 must attend school). N.Y. Lab. Law § 142 (restricting working hours for children age 14 and 15); *see also id.* § 143 (restricting, to lesser extent, working hours of children age 16 and 17); *cf.* N.Y. Educ. Law § 3226 (requiring permit for children 14 and 15 to do farm work). N.Y. Lab. Law § 133 (children 15 and younger may not be employed painting or cleaning the exterior of buildings, in any occupation in connection with factory, in any job involving dangerous machinery, or in any job related to mental hygiene). N.Y. Gen. Bus. Law § 434 (child 17 and younger not eligible to apply for barber's license). *Id.* § 406 (child 16 or younger not eligible for license in nail specialty, waxing, natural hair styling, aesthetics, or cosmetology). N.Y. Educ. Law §§ 6608-b, 6609 (child 16 or younger not qualified to be certified dental assistant or dental hygienist). *Id.* § 6906 (child 16 or younger not eligible for license as practical nurse). N.Y. Envtl. Conserv. Law § 13-0311 (child 16 or younger who wishes to apply for shellfish digger's permit must obtain signed consent from parent or legal guardian). *Id.* § 13-0328 (child 15 and younger not eligible for commercial food fish license). N.Y. Ins. Law § 4507 (child 14 or younger at nearest birthday not eligible for adult membership in fraternal benefit society). *Id.* § 3207 (child younger than 14 years 6 months not eligible to contract for life

insurance). N.Y. Pub. Health Law § 3555 (child 14 to 17 may only use ultraviolet tanning facility with parental consent). N.Y. Envtl. Conserv. Law § 6811 (child 15 or younger ineligible for certain hunting licenses). N.Y. C.P.L.R. 4508 (child 15 or younger not entitled to same confidentiality protections as adult when speaking to social worker; if social worker obtains information from child indicating child has been victim of crime, social worker may be required to testify regarding said information). N.Y. Penal Law § 265.05 (child 15 or younger may not possess air-gun). N.Y. Mental Hyg. Law § 9.13 (patient who is 15 or younger may not apply for voluntary admission to hospital for mental health treatment; child's parent, guardian, or next-of-kin may apply for admission on child's behalf). N.Y. Parks Rec. & Hist. Preserv. Law § 25.19 (child 14 to 17 may not operate snowmobile without safety certificate or adult supervision). N.Y. Mil. Law § 2 (male children 16 and younger excluded from militia). N.Y. Unconsol. Law § 8921 (child 15 or younger may not attend professional boxing or wrestling match unless accompanied by parent or guardian).

Laws extending extra protection to young adolescents: N.Y. Penal Law § 130.30 (protecting children 14 and younger from sexual intercourse with adults). *Id.* §§ 100.05, 100.08, 100.13, 105.05, 105.10, 105.13, 105.17 (protecting children 15 and younger from being drawn into criminal conduct by adults and/or from participation in criminal conspiracies with adults). *Id.* §§ 115.00, 115.01, 115.08 (providing

enhanced penalties for adult who helps child 15 or younger commit crime). *Id.* § 120.70 (protecting children 16 and younger from being lured into motor vehicles, watercraft, aircraft, buildings, or isolated areas for the purposes of committing certain crimes against children). *Id.* § 220.74 (enhanced penalty for manufacture of methamphetamine if offense committed in presence of child 15 or younger and offender is at least 5 years older than child). N.Y. Crim. Proc. Law §§ 65.00, 65.10 (child 14 or younger may testify via closed-circuit television under some circumstances). *Id.* § 60.44 (child 15 or younger may use anatomically correct doll in testifying in criminal proceedings related to sexual offenses). N.Y. Envtl. Conserv. Law § 9-1111 (power of state officials to impress any person for firefighting assistance not applicable to children 15 and younger). N.Y. Veh. & Traf. Law § 1229-c (driver of motor vehicle responsible for ensuring children 15 and younger are using safety belts or other child restraint devices). N.Y. Crim. Proc. Law § 510.15 (child 15 or younger may not be jailed with adults without approval of state division of youth).

NORTH CAROLINA

Laws establishing minimum age for rights and responsibilities: N.C. Gen. Stat. Ann. § 14-27.7A (West) (child 13, 14, or 15 incapable of consent to sexual activity with person 4 or more years older, with exception for marriage). *Id.* §§ 51-2, 51-2.1 (child 14 or 15 can marry only under particular

situations and with judicial consent; child 16 or 17 may not marry without parental consent). *Id.* § 14-410 (child 15 or younger cannot purchase fireworks). *Id.* § 130A-412.31 (child 15 or younger incapable of donating blood without parental consent). *Id.* § 130A-412.6 (child 15 or younger incapable of making decision to donate organs unless emancipated). *Id.* § 14-400 (child 17 or younger not permitted to obtain tattoo; parental consent required for body piercing). *Id.* § 20-171.9 (child 15 or younger required to wear helmet when riding bicycle). *Id.* § 20-11 (child 14 or younger cannot drive, 15-year-old eligible for learner's permit only), *amended in nonpertinent part by* 2011 N.C. Sess. Laws 2011-145 (H.B. 200, approved June 4, 2011, eff. July 1, 2011). *Id.* §§ 20-10.1, 160A-300.6 (child 15 or younger prohibited from operating mopeds or golf carts on public roadways). *Id.* § 115C-378 (children between 7 and 16 must attend school). *Id.* § 95-25.5 (child 15 or younger may only work limited hours in any employment). *Id.* § 58-58-100 (child 14 or younger unable to contract for insurance or annuities). *Id.* § 58-24-25 (child 14 or younger prohibited from membership in fraternal benefit societies).

Laws extending extra protection to young adolescents: N.C. Gen. Stat. Ann. § 14-178 (enhanced penalty for incest if victim is child aged 13, 14, or 15 and offender is at least 6 years older). *Id.* § 14-202.3 (children 15 or younger protected from solicitation with intent to commit an unlawful sexual act by means of a computer, unless the offender is

less than five years older than the child). *Id.* §§ 14-50.17, 14-50.18 (enhanced penalty for solicitation of gang activity if person solicited 15 or younger). *Id.* § 14-190.7 (children 15 and younger protected from distribution of obscene materials). *Id.* § 90-95 (enhanced penalty for selling controlled substance to child 15 or younger). *Id.* § 20-137.1 (requiring children 15 or younger to be secured in a seat belt). *Id.* § 20-135.2B (prohibiting operator of vehicle having an open bed or cargo area from transporting children 15 or younger in the bed or cargo area). *Id.* § 15A-1225.1 (authorizing remote testimony for children 15 or younger who would suffer emotional distress or would have their ability to communicate with the trier of fact impaired as a result of live testimony). *Id.* §§ 8-53.1, 8-57.1 (protecting children 15 or younger in child abuse cases by limiting husband-wife and physician-patient evidentiary privileges).

NORTH DAKOTA

Laws establishing minimum age for rights and responsibilities: N.D. Cent. Code Ann. § 12.1-20-03 (child under 15 unable to consent to sexual activity). *Id.* § 14-03-02 (child 15 or younger prohibited from entering into marriage contract; children 16 or 17 may not marry without parental consent). *Id.* §§ 39-06-03, 39-06-04 (child 15 or younger ineligible for full driver's license; child aged 14 or 15 may only operate a motor vehicle with learner's permit when accompanied by adult aged 18 or older). *Id.* § 15.1-20-01 (compulsory education between 7 and 16). *Id.*

§ 34-07-15 (child aged 14 or 15 may not be employed before 7 a.m. nor after 7 p.m., except that these hours are 7 a.m. to 9 p.m. during summer months, nor more than 18 hours during school weeks, nor more than 3 hours on schooldays, nor more than 40 hours during non-school weeks, nor more than 8 hours on non-schooldays). *Id.* § 43-04-23 (child 16 or younger ineligible to be registered as apprentice barber). *Id.* § 20.1-04-07 (child 14 or younger prohibited from holding spring wild turkey license).

Laws extending extra protection to young adolescents: N.D. Cent. Code Ann. § 12.1-20-03 (enhanced penalties for those who engage children 14 or younger in sexual acts). *Id.* § 12.1-20-03.1 (children 14 and younger protected from continuous sexual abuse). *Id.* § 12.1-20-05 (children 14 and younger protected from corruption and solicitation). *Id.* § 12.1-20-05.1 (enhanced penalties for those who lure child 14 or younger by electronic means). *Id.* § 39-21-41.2 (child 17 and under must be restrained in moving vehicle). *Id.* § 12-46-13 (child 15 and younger cannot be incarcerated with adults).

OHIO

Laws establishing minimum age for rights and responsibilities: Ohio Rev. Code Ann. §§ 2907.04, 2907.05 (West) (child 15 or younger incapable of consent to sexual activity with person 18 or older). *Id.* § 3101.01 (male child 17 or younger and female child 15 or younger incapable of contracting for

marriage without parental consent). *Id.* § 2108.31 (child 15 or younger not authorized to donate blood; 16-year-old may not donate blood without parental consent). *Id.* § 2108.04 (child 15 years 6 months or younger prohibited from making anatomical gift decision unless emancipated). *Id.* § 3730.06 (child 17 or younger incapable of receiving tattoo or piercing without parental consent and presence). *Id.* §§ 4507.071, 4507.05 (child 15 years 6 months or younger cannot drive; child under 16 eligible for temporary instruction permit only; child 16 or 17 only eligible for probationary license subject to nighttime driving restrictions). *Id.* § 3321.01 (child aged 6 to 18 must attend school). *Id.* § 4109.07 (establishing time limits on employment of children 15 and under, including not more than three hours on any school day; less strict time limits for minors 16 and 17).

Laws extending extra protection to young adolescents: Ohio Rev. Code Ann. § 2907.21 (enhanced penalty for compelling prostitution if person compelled is child 15 or younger). *Id.* § 5120.16 (child 17 or younger cannot be incarcerated with inmates over 18; exception if child does not follow rules and regulations; if department receives too few inmates under 18 to fill separate housing unit, child may be housed in unit with inmates under 21).

OKLAHOMA

Laws establishing minimum age for rights and responsibilities: Okla. Stat. Ann. tit. 21, § 1111

(West) (child 15 or younger incapable of consent to sexual intercourse). *Id.* tit. 43, § 3 (child 15 or younger incapable of contracting for marriage, except with judicial authorization in settlement of suit for seduction or paternity or if unmarried female is pregnant or has given birth to an illegitimate child; 16- and 17-year-old child may do so only with parental consent). *Id.* tit. 63, § 2152 (child 15 or younger incapable of donating blood). *Id.* tit. 63, § 2200.4A (child 15 or younger incompetent to make decision to donate organs, unless emancipated). *Id.* tit. 21, § 842.1 (child 17 or younger incapable of receiving tattoo; child 17 or younger incapable of receiving body piercing without parental consent and presence). *Id.* tit. 47 § 6-105 (child under 15 and a half cannot drive; 16-year-old eligible only for learner permit). *Id.* tit. 70, § 10-105 (child 17 or younger must attend school). *Id.* tit. 40, §§ 71, 72.1, 75, 76 (child 15 or younger prohibited from employment in hazardous occupations and from working certain hours). *Id.* tit. 15, §§ 13, 17 (child 17 or younger prohibited from making a contract relating to real property or to personal property not in the child's immediate possession or control).

Laws extending extra protection to young adolescents: Okla. Stat. Ann. tit. 21, § 1123 (children 15 and younger protected from sexual contact, electronically communicated indecent proposals, and enticement). *Id.* tit. 21, § 1040.13a (children 17 and younger protected while using the Internet and other electronic devices by felonies relating to use of computers and electronic devices to engage in sexual

communication). *Id.* tit. 21, § 1119 (children 14 and younger protected from abduction for marriage or crime involving moral turpitude). *Id.* tit. 21, § 891 (children 15 and younger protected from enticement). *Id.* tit. 21, § 853 (children 14 and younger protected from abandonment). *Id.* tit. 10, § 1628 (children 16 and younger protected by provision requiring immediate investigation upon report of missing child).

OREGON

Laws establishing minimum age for rights and responsibilities: Or. Rev. Stat. Ann. §§ 163.315, 163.415 (West) (child 17 or younger incapable of consenting to sexual activity). *Id.* § 106.010 (child 16 or younger incapable of entering contract for marriage). *Id.* § 109.670 (child 15 or younger not eligible to donate blood without parental consent). *Id.* § 97.955 (unemancipated child 14 or younger not able to consent to anatomical gift; parent or guardian may consent to anatomical gift on child's behalf). *Id.* § 814.485 (child 15 or younger must wear protective headgear when riding bicycle on highway or premises open to public). *Id.* §§ 807.060, 807.065, 807.220, 807.230, 807.280 (child 14 or younger may not drive motor vehicles, with limited exceptions for emergencies and children with no other means of transportation to and from school; 15-year-old child eligible for learner's permit only). *Id.* § 339.010 (child between ages 7 and 18 must attend school unless child has completed 12th grade). *Id.* § 653.315 (restricting work hours for children 15 and younger). *Id.*

§ 419B.851 (child 14 or younger cannot accept service of process for another at child's residence). *Id.* § 419B.558 (child 15 or younger may not be emancipated from parents). *Id.* § 660.126 (child 15 or younger may not work as apprentice). *Id.* § 814.600 (child 15 or younger must wear protective headgear when riding skateboard, scooter, or using inline skates on highway or premises open to public). *Id.* § 830.088 (child 12 to 15 years old may only operate motorboat if child obtains boating safety certificate; if boat has engine of 10 horsepower or greater, child must also be accompanied by older person).

Laws extending extra protection to young adolescents: Or. Rev. Stat. Ann. § 163.385 (protecting children 15 or younger from sodomy). *Id.* § 163.355 (protecting child 15 or younger from any sexual intercourse). *Id.* § 161.725 (when determining sentence for repeat offender, judge may not consider offenses committed when defendant was 15 years old or younger). *Id.* § 811.210 (penalties for adult who fails to ensure proper safety belt use by child 15 or younger). *Id.* § 137.705 (child 15 or younger who is charged as adult may not be detained in jail with adults).

PENNSYLVANIA

Laws establishing minimum age for rights and responsibilities: 18 Pa. Cons. Stat. Ann. § 3122.1 (West) (child 15 or younger incapable of consent to sexual activity with person four or more

years older who is not spouse). 23 Pa. Cons. Stat. Ann. § 1304 (child 15 or younger incapable of contracting for marriage without judicial consent; children age 16 and 17 cannot marry without parental consent). 35 Pa. Cons. Stat. Ann. § 10002 (child 15 or younger cannot donate blood; 16-year-old must have parental consent). 20 Pa. Cons. Stat. Ann. § 8611 (child 15 or younger incapable of executing anatomical gift; 16- and 17-year-old children must have parental consent). 18 Pa. Cons. Stat. Ann. § 6311 (child 17 or younger cannot be tattooed or get body piercing without parental consent and presence). 16 Pa. Stat. Ann. § 2175 (prohibiting child 15 or younger from becoming emancipated). 75 Pa. Cons. Stat. Ann. § 1503 (child 15 or younger cannot drive; 16-year-old eligible for restricted license only). *Id.* § 7725 (child 15 or younger prohibited from driving snowmobiles or ATVs on crossing streets without adult supervision). 24 Pa. Stat. Ann. § 13-1326 (child aged 8 to 16 must attend school). 43 Pa. Stat. Ann. §§ 42, 46 (children 15 or younger prohibited from working with limited exceptions and restrictions on working hours). 53 Pa. Stat. Ann. § 15322 (child 15 or younger cannot be plumber's apprentice). 63 Pa. Stat. Ann. §§ 510, 553 (child 15 or younger cannot receive cosmetology or barber license). 35 Pa. Cons. Stat. Ann. § 8114, § 8115 (children 15 and younger prohibited from becoming certified as emergency medical responders or technicians). 15 Pa. Cons. Stat. Ann. § 5722 (children 15 and younger may not serve on advisory board for nonprofit corporations organized primarily for recreational or youth development and delinquency prevention

purposes). 40 Pa. Stat. Ann. § 991.2411 (children 14 and younger are prohibited from membership in fraternal benefit societies). 53 Pa. Stat. Ann. § 4740 (child 15 or younger cannot attend public dance after 9 p.m.). 5 Pa. Cons. Stat. Ann. § 1122 (child 15 or younger from attending boxing contests or competitions unless accompanied by an adult); *see also id.* § 702 (children between 12 and 17 may participate in amateur boxing match only with parental permission). 18 Pa. Cons. Stat. Ann. § 7105 (child 17 and younger, and in some cases 15 and younger, prohibited from being in pool and billiard rooms).

Laws extending extra protection to young adolescents: 18 Pa. Cons. Stat. Ann. § 3127 (enhanced penalty for indecent exposure if child 15 or younger present). 42 Pa. Stat. Ann. § 9718 (enhanced penalty for aggravated assault, rape, involuntary deviate sexual intercourse, and aggravated indecent assault when victim 15 or younger). 75 Pa. Cons. Stat. Ann. § 4581 (child 17 or younger required to wear seatbelt in car). 18 Pa. Cons. Stat. Ann. § 7106 (theater managers prohibited from selling admission tickets for motion pictures rated as suitable for adults to children 15 and younger). 63 Pa. Stat. Ann. § 390-9 (prohibiting children 15 and younger from obtaining certain poisons). 42 Pa. Cons. Stat. Ann. §§ 5982, 5984.1 (child victim or witness 15 or younger protected through provision authorizing recorded testimony). 16 Pa. Stat. Ann. § 5543.2 (certain county commissioners to provide separate room to confine children 15 and younger in custody awaiting trial or hearing).

RHODE ISLAND

Laws establishing minimum age for rights and responsibilities: R.I. Gen. Laws Ann. § 11-37-6 (West) (defining age of consent as 16; child 14 or 15 incapable of consent to sexual penetration with person over 18). *Id.* § 15-2-11 (male 17 or younger or female 15 or younger can receive marriage license only with parental consent and after investigation by family court; female 16 or 17 eligible for marriage license with parental consent only). *Id.* § 11-13-3 (child 14 or younger may not buy ammunition with fulminate or any firearm arranged for explosion of cartridge or fulminate without parental consent). *Id.* § 23-4.5-1 (child 15 or younger may not donate blood; 16-year-old may not consent to donate blood without parental permission). *Id.* § 23-18.6.1-4 (child 15 or younger incompetent to consent to donate organs, unless emancipated). *Id.* § 31-19-2.1 (child 15 or younger required to wear helmet when riding bicycle or using skateboard, roller skates, inline skates, or scooter). *Id.* § 27-25-6 (no child 14 or younger may be adult member of fraternal benefit society). *Id.* § 31-10-6 (child 15 or younger may not drive; under graduated license scheme, children aged 16 to 18 may gradually acquire full driving privileges). *Id.* § 16-19-1 (child aged 6 to 16 must attend school). *Id.* § 11-9-11 (cities or town may designate curfew streets on which children 15 or younger are prohibited from loitering after 9 p.m. unless accompanied by adult). *Id.* § 28-3-3 (child 14 or younger prohibited from employment, child 15 or older may obtain special

limited permit to work, not during school hours and not in factories); *see also id.* § 28-3-11 (no child 15 or younger to work more than 40 hours per week). *Id.* § 28-45-9 (child 15 or younger may not enter apprenticeship program).

Laws extending extra protection to young adolescents: R.I. Gen. Laws Ann. §§ 11-23-1, 11-37-8.1 (elevating murder to first-degree when committed during any degree of child molestation against child 14 or younger). *Id.* § 11-26-1.4 (enhancing penalty for adult who kidnaps child 15 or younger with intent to secretly confine or sexually assault child). *Id.* § 11-26-1.5 (crime to entice, with felonious intent, child 15 or younger to leave child's home or to enter a car or building or a secluded area). *Id.* § 11-37-8.1 (enhancing punishment for sexual penetration of child 14 or younger). *Id.* § 11-37-13.2 (protecting children from unreasonable mental or emotional harm by providing that court may allow victim of sexual crime who is 17 or younger at time of trial to testify in criminal prosecution via videotaped deposition or closed-circuit television, and by establishing rebuttable presumption that child 14 or younger is unable to testify without unreasonable mental or emotional harm). *Id.* § 14-1-26 (delinquent child 17 or younger shall not be transferred to or from juvenile institution with adult offenders).

SOUTH CAROLINA

Laws establishing minimum age for rights and responsibilities: S.C. Code Ann. § 16-15-342 (West) (child 15 or younger incapable of consenting to sexual activity with adult). *Id.* § 20-1-100 (child 15 or younger may not marry under any circumstances). *Id.* § 40-56-220 (sale of fireworks to child 15 or younger prohibited). *Id.* § 44-43-20 (child 15 or younger prohibited from donating blood; 16-year-old may only donate blood with parental consent). *Id.* § 44-43-315 (child 15 or younger may not consent to donate his or her organs). *Id.* §§ 56-1-40, 56-1-175 (child 14 or younger cannot drive; child who is 15 is eligible for beginner's permit or conditional license only). *Id.* § 59-65-10 (child 16 or younger must attend school). S.C. Code Ann. Regs. 71-3103 (child 15 or younger may only work subject to child labor laws). *Id.* 71-3106 (child 14 or 15 prohibited from working more than three hours per day while school in session and barred from working in, *inter alia*, manufacturing, mining, warehousing and storage, transportation, construction, and baking). S.C. Code Ann. § 7-13-110 (child 15 or younger ineligible to work as poll manager's assistant during elections). *Id.* § 50-5-325 (child 15 or younger barred from serving as master of commercial fishing trawler). *Id.* § 25-3-40 (child 16 and under may not serve in South Carolina State Guard). *Id.* § 40-7-230 (child 16 or younger may not become licensed barber; child 15 or younger may not be licensed barber's assistant or apprentice). *Id.* § 38-38-110 (child 14 or younger not eligible for adult

membership in fraternal benefit society). *Id.* § 52-19-90 (child 15 or younger may not bungee jump without parental consent). *Id.* § 44-43-710 (child 15 or younger incompetent to consent to autopsy of deceased relative). *Id.* § 44-52-20 (child 15 or younger may not voluntarily admit herself to treatment facility for drug or alcohol dependence; child's parent or legal guardian may apply for admission on child's behalf).

Laws extending extra protection to young adolescents: S.C. Code Ann. § 16-3-655 (special protections against sexual battery for children between ages 11 and 14). *Id.* § 16-15-140 (children 15 and younger protected from lewd or lascivious acts). *Id.* § 16-15-342 (for crimes involving children 15 and younger, consent is no defense to a charge of criminal solicitation). *Id.* § 56-5-2947 (enhanced penalty for failure to stop vehicle when signaled by law-enforcement officer or for operating vehicle while under influence of alcohol or drugs when child 15 or younger in vehicle). *Id.* § 56-5-6520 (penalizing driver of car when child 17 or younger does not wear seat belt, unless child has driver's license or learner's permit). *Id.* § 44-53-577 (protecting children 16 and younger from being lured or enticed into participating in the sale of narcotics). *Id.* § 56-5-3900 (unlawful to transport child 14 or younger in open area of pickup truck or trailer unless special requirements are met). S.C. Const. art. XII, § 3 (child 16 or younger may not be incarcerated with adult offenders); S.C. Code Ann. § 63-19-1440 (child 16 or younger may not be incarcerated in a state penal or correctional institute).

SOUTH DAKOTA

Laws establishing minimum age for rights and responsibilities: S.D. Codified Laws § 22-22-7.3 (West) (child 15 or younger incapable of consent to sexual activity with person not spouse, and punishable offense to have sexual contact with another child 15 or younger). *Id.* § 25-1-9 (child 15 or younger incapable of contracting for marriage; child 16 or 17 may only do so with parental consent). *Id.* § 26-2-7 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 32-12-11 (14-year-old child eligible only for driving instruction permit which requires adult supervision for the first six months); *see also id.* § 32-12-6 (child 17 or younger cannot obtain a driver's license without parental consent). *Id.* § 13-27-1 (children 6 to 17 must attend school). *Id.* § 60-12-1 (limiting hours of employment for children 15 or younger); *see also id.* § 60-12-3 (child 15 or younger cannot be employed in occupations dangerous to life, health, or morals, with limited exceptions).

Laws extending extra protection to young adolescents: S.D. Codified Laws § 22-22-7 (children 15 and younger protected from sexual contact with older persons). *Id.* §§ 22-24A-4, 22-24A-5 (children 15 and younger protected from solicitation for sexual acts by persons over 18, including use of computer in furtherance of such solicitation). *Id.* § 22-19-7.1 (children 15 and younger protected from enticement for illegal purposes). *Id.* § 23A-12-9 (child 15 or younger who is victim of sex crime protected through

provision authorizing use of victim's videotaped deposition in criminal prosecution where judge finds that in-court testimony would be substantially detrimental to child victim's well-being). *Id.* § 32-37-1.3 (children 14 to 17 required to wear seat belts). *Id.* § 26-2-6 (contract by child 15 or younger may later be disaffirmed). *Id.* § 26-7A-26 (children 17 or younger confined in an adult detention facility while awaiting trial must be kept physically separate and may have no sight or sound contact with adult detainees).

TENNESSEE

Laws establishing minimum age for rights and responsibilities: Tenn. Code Ann. §§ 36-3-105, 36-3-106, 36-3-107 (West) (child 15 or younger ineligible for marriage license unless judge or county mayor issues waiver; 16- and 17-year-olds may not marry without parental consent). *Id.* § 68-104-112 (child 15 or younger incapable of purchasing fireworks). *Id.* § 68-32-101 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 68-30-104 (child 14 or younger incapable of making decision to donate organs unless emancipated minor). *Id.* § 55-52-105 (child 15 or younger required to wear helmet when riding bicycle). *Id.* § 62-38-211 (child 17 or younger may not be tattooed; 16- and 17-year-olds eligible for tattooing only to cover existing tattoo and with parental consent and presence). *Id.* § 68-117-104 (child 17 or younger must have parental consent to use tanning salon). *Id.* § 62-38-305 (child 17 or younger ineligible for body

piercing without parental consent). *Id.* § 39-13-506 (child 17 or younger incapable of consent to sexual activity except with person less than four years older than child). *Id.* §§ 55-50-311, 55-50-312 (14-year-old eligible to drive only with special restricted license, and only if hardship can be shown; 15-year-old eligible for learner's permit with parental consent). *Id.* § 49-6-3001 (children between 6 and 17 must attend school). *Id.* § 39-17-1702 (children 16 and younger have curfew of 10 p.m. on weekdays, 11 p.m. on weekends; 17-year-olds have curfew of 11 p.m. on weekdays, 12 a.m. on weekends). *Id.* §§ 50-5-104, 50-5-106 (limiting employment hours for 14- and 15-year-olds and limiting type of occupations for all minors).

Laws extending extra protection to young adolescents: Tenn. Code Ann. § 39-13-506 (children 13 to 17 protected from sexual contact with older persons). *Id.* § 39-13-529 (children 17 and younger protected while using Internet and electronic communication by creation of felony for solicitation of child using computer or electronic communication). *Id.* §§ 39-17-417, 39-17-418 (enhancing penalties for drug offenses where children 17 or younger are the recipients of controlled substance). *Id.* § 55-10-403 (enhanced penalty for driving under the influence when children 17 or younger are present). *Id.* § 55-9-602 (children 13 to 15 protected by requirement that driver of motor vehicle secure children with seat belts). *Id.* § 37-1-134 (children 15 and younger convicted of crimes protected from incarceration with adults).

TEXAS

Laws establishing minimum age for rights and responsibilities: Tex. Penal Code Ann. § 21.11 (West) (child 16 or younger incapable of consenting to sexual activity). Tex. Fam. Code Ann. § 2.009 (child 15 or younger ineligible for marriage license without court order; child 16 or 17 may obtain marriage license only with parental consent, documents establishing that a prior marriage of the applicant has been dissolved, or a court order). Tex. Occ. Code Ann. § 2154.252 (child 15 or younger not permitted to purchase fireworks). Tex. Health & Safety Code Ann. § 162.015 (child 16 or younger incapable of consenting to donate blood). *Id.* § 692A.004 (child 15 or younger incapable of making anatomical gift decision; child 16 or 17 must obtain parental consent). *Id.* § 146.012 (child 17 or younger not permitted to get tattoo without parental consent). Tex. Transp. Code Ann. §§ 521.201, 521.222 (child 14 or younger not eligible for driver's license or instruction permit; child 17 or younger must comply with certain requirements). Tex. Educ. Code Ann. § 25.085 (children aged 6 to 17 required to attend school). Tex. Lab. Code Ann. § 51.013 (child aged 14 and 15 only permitted to work limited hours).

Laws extending extra protection to young adolescents: Tex. Penal Code Ann. § 22.011 (children 16 and younger protected from sexual assault). *Id.* § 49.045 (enhanced penalty for driving while intoxicated when child 14 or younger in car). Tex. Transp. Code Ann. § 545.413 (penalizing driver of car when

child 16 or younger does not wear seat belt). Tex. Penal Code Ann. § 22.041 (children 14 and younger protected from abandonment and endangerment). *Id.* § 22.04 (children 14 and younger protected from serious bodily injury, serious mental impairment or injury, bodily injury, or exploitation by creation of felonies). *Id.* § 33.021 (protecting children 16 or younger from sexually explicit communication through electronic communication service).

UNITED STATES (FEDERAL)

Laws establishing minimum age for rights and responsibilities: 10 U.S.C.A. § 505 (West) (child 16 or younger prohibited from enlisting in Army, Navy, Air Force, Marine Corps, or Coast Guard; 17-year-old may not do so without written consent of parent or guardian, if such person is entitled to child's custody and control). *Id.* § 311 (children 16 and younger excluded from mandatory unorganized militia consisting of able-bodied males 17 to 45 and females who are members of National Guard). *Id.* §§ 4346, 6958, 9346 (child 16 or younger ineligible for admission to United States Military Academy, United States Naval Academy, or United States Air Force Academy). 29 U.S.C.A. §§ 203, 212, 213 (regulating child labor and distinguishing between teens younger than 16 and teens 16 or 17 years old); *see also* 41 U.S.C.A. § 6502 (contractor doing business with United States under contract exceeding $10,000 in value shall not employ child 15 or younger in manufacture or production or furnishing of any materials,

supplies, articles, or equipment included in contract); 16 U.S.C.A. § 1725 (child 16 or younger ineligible for employment as resource assistant in any Federal land managing agency). 8 U.S.C.A. § 1182 (children 15 and younger not subject to prohibition of visas and admission to United States for aliens affiliated with Communist or totalitarian party because membership involuntary). 16 U.S.C.A. § 6802 (child 15 or younger not required to pay entrance fee for federal recreational lands and waters); *see also* 36 C.F.R. §§ 3.6, 2.18 (child 15 or younger must be accompanied or supervised by adult to operate power-driven vessel and snowmobile in national park). 14 C.F.R. § 121.585 (child 14 or younger ineligible to sit in exit row seat on airplane). 20 C.F.R. § 404.612 (child 15 or younger may not sign his own application for social security disability or survivor benefits; application must be signed by court-appointed representative, guardian or other care-taker).

Laws extending extra protection to young adolescents: 10 U.S.C.A. § 920 (child 15 or younger incapable of consent to sexual activity). *Id.* § 3056 (Secret Service authorized to protect children 15 and younger of former United States President; period not to exceed 10 years). *Id.* § 2442 (protecting children 14 and younger from recruitment as child soldiers by punishing recruitment, enlistment, or conscription of such children into an armed force or group, or use of such children to participate actively in hostilities). U.S. Sentencing Guidelines Manual § 3B1.4 ("Using a Minor To Commit a Crime") (2011) (adding 2 offense

levels to guidelines calculation where defendant used or attempted to use child 17 or younger to commit offense or avoid detection). *Id.* § 2A2.3 (adding 4 offense levels to guidelines calculation for conviction of certain assault offenses where victim is 15 or younger). 18 U.S.C.A. § 2241 (providing enhanced punishment for aggravated sexual abuse in prison or other location subject to federal jurisdiction where victim 15 or younger); *see also* U.S. Sentencing Guidelines Manual § 2A3.1 (2011) (adding 2 offense levels to guidelines calculation for conviction of criminal sexual abuse under 18 U.S.C.A. §§ 2241-2242 where victim is child between 12 and 15). 18 U.S.C.A. § 2422 (providing for enhanced criminal penalties – including possible life sentence – for adult who knowingly induces, entices, persuades or coerces child 17 or younger to engage in prostitution or other illegal sexual activity). 18 U.S.C.A. §§ 2251 to 2260A (protecting children generally against child pornography and other related sexual exploitation through laws penalizing, *inter alia*, production, distribution, Internet distribution, sale, and possession of sexually explicit materials involving children); *see also, e.g.*, U.S. Sentencing Guidelines Manual § 2G2.1 (2011) (adding 2 offense levels to guidelines calculation for convictions relating to sexual exploitation of minors and production of sexually explicit materials involving minors under 18 U.S.C.A. §§ 1591, 2251, or 2260(b), where victim is child between 12 and 15). 7 U.S.CA. § 2015 (children 14 or younger exempt from labor and other requirements imposed on adults in

order to receive Supplemental Nutrition Assistance Program benefits).

UTAH

Laws establishing minimum age for rights and responsibilities: Utah Code Ann. §§ 76-5-401, 76-5-401.2 (West) (child 15 or younger incapable of consenting to sex; child 16 or 17 incapable of consenting to sex with person 10 or more years older than child). *Id.* §§ 30-1-8, 30-1-9 (child 15 or younger may not marry unless child and parent obtain judicial court authorization; child 16 or 17 requires parental consent). *Id.* § 26-31-202 (child 15 or younger not eligible to donate blood; 16-year-old requires parental consent). *Id.* § 26-28-104 (child 14 or younger cannot consent to organ donation, and child 17 or younger cannot unless emancipated); *cf. id.* § 78A-6-803 (child 15 or younger not eligible for emancipation). *Id.* §§ 41-8-2, 53-3-204, 53-3-210.5 (child 15 or younger may not be licensed to drive, with certain exceptions; 15-year-old may obtain learner's permit; child 16 or younger may not drive after midnight). *Id.* § 41-6a-1115 (child 14 or younger prohibited from operating motor assisted scooter using motor without direct parental supervision). *Id.* § 23-20-20 (child 15 or younger may only hunt while accompanied by person over 21). *Id.* § 34-23-202 (child 15 or younger may not work during school hours or for more than 4 hours on a school day); *see also id.* § 34-23-201 (child 17 or younger cannot work in hazardous occupation unless under close supervision in apprentice or vocational

training program with approval of Labor Division). *Id.* § 31A-21-103 (child 15 or younger not competent to contract for insurance).

Laws extending extra protection to young adolescents: Utah Code Ann. §§ 76-5-401, 76-5-401.1 (protecting children 14 and 15 years old by criminalizing sexual activity and sexual abuse with child). *Id.* § 76-10-1204 (reducing penalty against children 17 or younger for distribution of pornographic material). *Id.* § 41-6a-503 (enhanced penalty for driving under influence of alcohol or drugs when child 15 or younger in car). *Id.* § 41-6a-1803 (children 15 and younger protected by provision requiring driver to ensure children wear seat belts).

VERMONT

Laws establishing minimum age for rights and responsibilities: Vt. Stat. Ann. tit. 13, § 3252 (West) (child 14 or younger incapable of consenting to sex; 15-year-old cannot consent to sex with person 19 or older). *Id.* tit. 18, § 5142 (child 15 or younger may not receive marriage license; 16- and 17-year-old may do so only with parental consent). *Id.* tit. 18, § 9 (children 16 or younger cannot consent to donate blood without parental authorization). *Id.* tit. 23, §§ 606, 607, 617 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit; 16- and 17-year-olds eligible for limited junior license). *Id.* tit. 16, § 1121 (children age 6 to 16 must attend school). *Id.* tit. 21, §§ 431, 434 (child 15 or younger ineligible to

work when school in session without filing certificate of eligibility from commissioner, and may work only during limited hours). *Id.* tit. 24, § 2151 (municipalities may create curfews for children 15 or younger). *Id.* tit. 8, §§ 3710, 4470 (child 14 or younger may not contract for insurance or be admitted to fraternal benefit society). *Id.* tit. 10, § 4254 (child 15 or younger eligible for hunting and archery license only with written consent of parent/guardian; child 14 or younger ineligible for fishing license). *Id.* tit. 7, § 1002 (child 15 or younger prohibited from selling tobacco).

Laws extending extra protections to young adolescents: Vt. Stat. Ann. tit. 12, § 1612 (various health professionals required to disclose information indicating a patient 15 or younger has been victim of a crime). *Id.* tit. 13, § 1063 (crime of stalking aggravated if victim 15 or younger). *Id.* tit. 13, § 1460 (general public excluded from hearings in hate crime matters where defendant 15 or younger). *Id.* tit. 13, § 2828 (crime to lure child 15 or younger into sexual act by any means). *Id.* tit. 13, §§ 2821, 2822, 2824, 2827 (children 15 or younger protected from various forms of sexual exploitation). *Id.* tit. 13, § 4007 (penalty for person other than parent or guardian or firearms instructor who sells or furnishes firearms to child 15 or younger). *Id.* tit. 15, § 512 (parent or guardian of child who married at age 15 or younger may seek annulment).

VIRGINIA

Laws establishing minimum age for rights and responsibilities: Va. Code Ann. §§ 18.2-63, 18.2-371 (West) (child 14 or younger incapable of consent to sexual activity; child who is 15, 16 or 17 incapable of consent to sexual activity with adults). *Id.* §§ 20-48, 20-49 (child 15 or younger may not get married unless one of parties seeking to be married is pregnant or has recently given birth; child who is 16 or 17 and has not been previously married may not marry without parental consent). *Id.* § 32.1-291.4 (child 15 and a half or younger may not consent to donate organs after death unless emancipated); *cf. id.* § 16.1-331 (child 15 or younger not eligible for emancipation). *Id.* § 18.2-371.3 (child 17 or younger may not be tattooed or undergo body piercing except in presence of child's parent or guardian or when done under supervision of medical doctor). *Id.* §§ 46.2-334, 46.2-335 (child younger than 15 years 6 months may not drive; child who is at least 15 years 6 months but younger than 16 years 3 months may obtain learner's permit only; child who is at least 16 years 3 months but younger than 18 may obtain license subject to special conditions). *Id.* § 46.2-914 (child 15 or younger may not operate moped on roadway). *Id.* § 22.1-254 (compulsory schooling for children older than 5 and younger than 18). *Id.* §§ 40.1-78, 40.1-79.01 (child 14 or 15 may not be employed during school hours except in connection with educational training program); *see also id.* § 40.1-80.1 (limiting work hours for children 15 or younger); *id.* § 40.1-100

(children 17 or younger may not work in variety of professions, including meat packing, slaughtering animals, roofing, operating power-driven baking machines, operating power-driven paper products machines, or job involving driving at night; children 15 or younger barred, except as part of approved training program, from wide array of professions including work in any dance studio, carnival, pool hall, outdoor fair, as aid or orderly in hospital or nursing home, in service of veterinarian treating horses or farm animals, in funeral home, providing room service in hotel or motel, as theater usher, or as lifeguard).

Laws extending extra protection to young adolescents: Va. Code Ann. §§ 18.2-63, 18.2-67.4:2 (protecting children aged 13 and 14 from sexual activity with adults and older children). *Id.* § 18.2-67.3 (enhanced penalties for sexual battery where victim is 13 or 14 years old and act accomplished by force, will, or intimidation; or where victim is between 13 and 17 and offense is committed by parent, step-parent, grandparent, or step-grandparent). *Id.* § 18.2-370 (protecting children 14 or younger from various acts of sexual abuse by adults). *Id.* § 18.2-374.1 (enhancing penalties for child pornography when victim is 14 or younger). *Id.* § 18.2-371 (protecting children ages 15, 16, and 17 from consensual sexual activity with adults); *see also id.* (misdemeanor for person 18 or older to contribute to delinquency of person 17 or younger, contribute to abuse or neglect of child, or place child in need of supervision or

services). *Id.* § 18.2-374.3 (enhancing penalties for improper solicitation of minor over the Internet or via other electronic communications systems when victim is child 14 or younger). *Id.* § 18.2-67.9 (where child witness or victim in certain criminal cases is 14 or younger, court may order that child testify via closed-circuit television when child refuses to testify in open court, is substantially unable to communicate, or would suffer severe emotional trauma from testifying in open court). *Id.* § 18.2-270 (enhanced penalty for driving while intoxicated with a child 17 or younger in the car). *Id.* § 46.2-1095 (driver of car must ensure that child 17 or younger wears seat belt).

WASHINGTON

Laws establishing minimum age for rights and responsibilities: Wash. Rev. Code Ann. §§ 9A.44.030, 9A.44.079 (West) (child 15 or younger incapable of consenting to sexual activity outside of marriage with person 4 or more years older). *Id.* § 26.04.010 (child 16 or younger cannot marry absent showing of necessity and judicial approval). *Id.* § 70.01.020 (child 17 or younger incapable of donating blood without parental consent). *Id.* § 70.77.515 (illegal to sell fireworks to child 15 or younger). *Id.* § 68.64.030 (child younger than 15 and a half incompetent to make decision to donate organ without parental consent unless child is emancipated minor). *Id.* § 26.28.085 (misdemeanor to tattoo child 17 or younger). *Id.* § 46.20.055 (child 14 or younger cannot drive; 15-year-old eligible for learner's permit); *see*

also id. § 46.20.500 (child 15 or younger may not operate electric-assisted bicycle). *Id.* § 46.20.100 (child 17 or younger cannot obtain driver's license without signed endorsement by parent or guardian, or if no parent or guardian, by child's employer). *Id.* § 28A.225.010 (child aged 7 to 17 must attend school). *Id.* § 49.12.123 (work permit required to employ child 17 or younger). *Id.* § 49.12.300 (child 15 or younger not permitted to be employed in house-to-house sales unless Department of Labor and Industries grants variance permit).

Laws extending extra protection to young adolescents: Wash. Rev. Code Ann. §§ 9A.44.079, 9A.44.089 (West) (children 14 and 15 protected from sexual contact with older persons through various statutes criminalizing such contact). *Id.* § 9.68A.150 (gross misdemeanor to knowingly allow child 17 or younger to be on premises of public commercial establishment if there is live performance containing erotic material). *Id.* § 46.61.5055 (enhanced penalty for driving while intoxicated when child 15 or younger in car). *Id.* § 46.61.688 (no person may operate motor vehicle unless all children 15 or younger wearing seat belts). *Id.* § 9A.32.055 (crime to cause death to children 15 or younger under circumstances manifesting an extreme indifference to human life when perpetrator has history of assaulting or torturing that child). *Id.* § 46.61.685 (unlawful to leave child age 15 or younger unattended inside running car). *Id.* § 72.01.410 (when child 17 or younger sentenced to adult correctional facility, secretary of corrections

may transfer child to juvenile correctional facility until age 21; if child is housed in adult correctional facility, child must be kept in housing separated from adult offenders until 18th birthday; limited exception under which child may be kept in administrative segregation unit which also houses adult offenders, but within unit, child must be kept physically separated from adult offenders).

WEST VIRGINIA

Laws establishing minimum age for rights and responsibilities: W. Va. Code Ann. § 61-8B-5 (West) (child 15 or younger incapable of consent to sexual activity with person over age 16 and 4 years older, except spouse). *Id.* § 48-2-301 (child 15 or younger incapable of consenting to marriage without judicial and parental consent; 16- and 17-year-olds require only parental consent). *Id.* § 16-21-1 (child 15 or younger incapable of donating blood; 16-year-old requires parental consent). *Id.* § 16-19-4 (child 15 or younger incapable of consenting to organ donation, unless emancipated); *cf. id.* § 49-7-27 (child 15 or younger ineligible for emancipation unless married). *Id.* § 17C-11A-4 (child 14 or younger required to wear helmet when riding bicycle). *Id.* § 33-6-4 (minor 14 or younger incapable of contracting for life or accident insurance). *Id.* §§ 17B-2-3, 17B-2-3a (applying graduated licensing system in which child 14 or younger cannot drive, 15-year-old is eligible for instruction permit only, and 16- and 17-year-olds are eligible for restricted intermediate license only).

Id. § 18-8-1a (child 15 or younger must attend school). *Id.* § 21-6-7 (child 15 or younger may work only limited hours).

Laws extending extra protection to young adolescents: W. Va. Code Ann. § 61-2-9b (enhanced penalty for assault of child 16 or younger and near school). *Id.* § 61-2-14 (punishing kidnapping or concealment of child 15 or younger). *Id.* § 61-2-14f (enhanced penalty for abduction of child 16 or younger near school). *Id.* § 49-5-16 (no child 17 or younger, including one transferred and convicted in adult court, shall be incarcerated in adult prison).

WISCONSIN

Laws establishing minimum age for rights and responsibilities: Wis. Stat. Ann. § 765.02 (West) (child 15 or younger incapable of contracting for marriage; child 16 or 17 may do so only with parental consent). *Id.* § 948.02 (child 15 or younger may not consent to sexual intercourse). *Id.* § 146.33 (child 15 or younger incapable consenting to donate blood; 16-year-old requires parental consent). *Id.* § 157.06 (child under 15 years 6 months of age incapable of making decision to donate organs, unless emancipated). *Id.* § 948.70 (child 17 or younger may not be tattooed except by physician for medical reasons). Wis. Admin. Code DHS § 173.10 (child 15 or younger may not get body piercing; children 16 and 17 must have informed parental consent). Wis. Stat. Ann. §§ 343.06, 343.07, 343.08 (child 15 or younger

may not hold regular driver's license, except that subject to restrictions, child aged 14 may apply for restricted license). *Id.* § 23.33 (child 15 or younger cannot rent or lease all-terrain vehicle). *Id.* § 118.15 (children 6 to 18 must attend school, with some exceptions requiring parental consent). *Id.* § 103.67 (child 15 or younger subject to restrictions on number of hours they can work).

Laws extending extra protection to young adolescents: Wis. Stat. Ann. §§ 948.02, 948.09 (criminalizing sexual contact or intercourse with a child 15 or younger as felonious sexual assault; sexual intercourse with child 16 or 17 as misdemeanor). *Id.* § 948.075 (children 15 and younger protected while using Internet by creation of felony relating to the use of computers to facilitate a child sex crime). *Id.* §§ 948.01, 948.70 (crime to tattoo or offer tattoo to child 16 or younger). *Id.* § 346.65 (increasing penalties for various offenses related to reckless and drunken driving when a child 15 or younger in the car at time of violation). *Id.* § 967.04 (in criminal prosecution or certain other proceedings, child witness 15 or younger may testify by recorded deposition rather than in open court, if judge finds that this is necessary to protect interests of child). *Id.* § 302.18 (children 14 and younger protected from incarceration with adults); *see also id.* § 938.209 (children 14 or younger confined in an adult facility awaiting trial must be kept physically separate from adult detainees and may have no sight or sound contact with adult detainees).

WYOMING

Laws establishing minimum age for rights and responsibilities: Wyo. Stat. Ann. § 6-2-316 (West) (child 15 or younger incapable of consent to sexual contact with person 17 or older, unless age gap is less than four years). *Id.* § 20-1-102 (child 15 or younger cannot contract for marriage unless approved by a judge and parental consent is given). *Id.* § 35-5-204 (child 15 or younger incapable of consenting to organ donation, and child 17 or younger incapable unless emancipated minor); *cf. id.* § 14-1-203 (child 16 or younger ineligible to become emancipated minor). *Id.* §§ 31-7-108, 31-7-110, 31-7-117 (child 15 or younger ineligible for unrestricted driver's license). *Id.* § 21-4-102 (children 15 and younger are required to attend school). *Id.* §§ 27-6-110, 27-6-111 (limiting work hours for children 15 and younger); *see also id.* § 27-6-112 (prohibiting children 15 and younger from working in certain dangerous occupations); *id.* § 27-6-114 (prohibiting employment of children 15 and younger in immoral or dangerous ways). *Id.* § 33-7-209 (child 16 or younger ineligible to be licensed as barber). *Id.* §§ 26-15-105, 26-29-206 (child 14 or younger incapable of contracting for life insurance or adult membership in fraternal benefit society). *Id.* § 19-8-102 (child 16 or younger ineligible to serve in state militia).

Laws extending extra protection to young adolescents: Wyo. Stat. Ann. §§ 6-2-314 to 6-2-317; (establishing various crimes protecting young adolescents from sexual contact or abuse by older persons). *Id.* § 31-5-233 (enhanced penalty for driving under

influence of intoxicating liquor by adult with child 15 or younger in car). *Id.* § 6-4-403 (protecting children 15 or younger from abandonment or endangerment by parent, guardian, or custodian); *see also id.* § 6-4-405 (children 15 and younger protected from entering or remaining in any room, dwelling, or vehicle where methamphetamine is manufactured or sold). *Id.* § 6-4-406 (children 17 or younger protected from adult throwing a house party where alcoholic liquor, malt beverage, or illegal drug is to be possessed or consumed).

REPLY BRIEF

No. 10-9646

In The

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Alabama Court Of Criminal Appeals

REPLY BRIEF FOR PETITIONER

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1. The Factual and Legal Defects in Respondents' Argument that the Minuscule Number of 14-Year-Old Children Sentenced to Life Without Parole Is the Product of a Rational Process for Selecting the Most Culpable Juvenile Homicide Offenders

Alabama and its *amici* suggest that the handful of life-without-parole sentences imposed on 14-year-old children are the product of a rational and careful selection of the worst-of-the-worst young homicide offenders. Ala. Resp't Br. 1, 50-51; Nat'l Dist. Att'ys Ass'n *Amicus* Br. 13-16.[1] The mandatory nature of the vast majority of these sentences, including Evan Miller's, makes it highly unlikely that a systematic selection process for assigning life-without-parole sentences to only the most culpable offenders is in operation; and it makes the regularity of any such process legally unreviewable and factually unverifiable.[2] But the circumstances of Evan Miller's case –

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[1] This is coupled with an argument that the rarity of life-without-parole sentences for homicides by children 14 and under simply reflects the relatively low incidence of such homicides. Ala. Resp't Br. 1, 10, 31-33. That argument is addressed at pages 2-10 of the *Jackson* petitioner's Reply Brief.

[2] When Alabama asserts that "prosecutors appropriately exercise discretion" to limit the number of life-without-parole sentences imposed under a mandatory life-without-parole sentencing statute (Ala. Resp't Br. 1), it must be talking about a prosecutorial power either (1) to proceed in juvenile court rather than in adult court under *"[co]ncurrent-jurisdiction statutes* [that] give the prosecutors discretion to choose to file 'cases in either' court" (Ala. Resp't Br. 4; *see also id.* at 8 (reciting that in Evan's case, "[b]ecause the juvenile court had limited power to

(Continued on following page)

as well as those of Kuntrell Jackson's case – cast added doubt on Alabama's theory that prosecutorial discretion can be relied upon to reserve juvenile life-without-parole sentences for the most culpable offenders.

It is noteworthy that, in contending that "the evidence presented at [Evan Miller's] trial shows why life without parole can be an appropriate punishment when 14-year-olds commit aggravated murder" (Ala. Resp't Br. 6), the State adverts only to "evidence" about the events on the night of the crime. *See* Ala. Resp't Br. 6-7. This exclusive focus, ignoring everything else in Evan Miller's life history, must reflect a confidence that Evan's crime *alone* will support an inference of lifelong incorrigibility, making it "appropriate" to deny him consideration for parole forever.[3] Such confident prediction is unwarranted by the facts surrounding the crime and is undermined still further when Evan's background is considered.

"[T]he evidence presented at trial" (Ala. Resp't Br. 6) shows that the killing of Mr. Cole Cannon was

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punish him, . . . , the District Attorney asked that court to move the case to adult court")), or (2) to forestall the statutorily mandated sentence by filing lesser charges even when the evidence of a life-without-parole-punishable homicide offense is ample.

[3] "To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible." *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

not calculated or considered but occurred spontaneously and impulsively in the setting of a drug-, alcohol-, and crime-saturated environment into which 14-year-old Evan Miller was situated by the adults around him. Evan and his older friend Colby Smith were preparing to go to bed when the 52-year-old Mr. Cannon came to Evan's trailer (R. 710), late at night and visibly intoxicated, not only looking for food, but also to purchase drugs from Evan's mother (R. 1003-04). When he returned to his own trailer at around 2 or 3 a.m., Mr. Cannon permitted the teens to accompany him. R. 710, 982. He provided them with alcohol (R. 710) and requested that they purchase marijuana, which they did (R. 982, 1008-09). Mr. Cannon shared the marijuana with the teens and played drinking games with them. J.A. 132-33; R. 983, 1009.

It was in this context of intoxication (J.A. 45, 138) that violence flared and grew progressively wilder in the wee hours of the morning. To the extent that Evan and Colby had any intentions of committing a crime when they accompanied Mr. Cannon to his trailer, it was solely to steal his money, not to kill him. R. 981. This was undisputed at trial. J.A. 132. Only when Mr. Cannon unexpectedly awakened and initiated the chain of physical aggression by grabbing Evan's throat and choking him did any violence arise. R. 984; J.A. 133. Drunk, high, and reacting to this assault, Evan and Colby responded brutally. R. 985. They then went on to beat Mr. Cannon in the frighteningly ugly manner detailed by the State at Ala. Resp't Br. 6-7. Only fifteen minutes later, the teens

returned to Mr. Cannon's trailer and made a panicked effort to conceal what had happened by setting the fires that ultimately caused his tragic death. R. 1021; J.A. 133.

As set forth more fully in Evan's opening brief (Miller Pet'r Br. 5-6), the circumstance that, at age 14, he could be found at Mr. Cannon's trailer at 2 a.m. playing drinking games exemplifies the abusive and neglectful environment in which he was raised. The adults responsible for his upbringing had physically abused him, failed to provide him with a safe place to live or other basic necessities, and taught him to use drugs and alcohol. J.A. 26-27, 61-68. His father violently beat Evan, his mother, and his siblings on a regular basis throughout his early childhood. J.A. 26, 61-63. This abuse was so extreme that, as young as age five, Evan attempted to hang himself to escape. J.A. 28, 63. After the abuse continued for several more years, the State finally removed Evan and his siblings from the home. J.A. 26, 61.

Evan had no significant difficulties until he was returned to his mother's care more than two years later. J.A. 26, 62. Following his return, his mother was absent for up to sixteen hours a day, was addicted to alcohol and illegal drugs, and failed to adequately provide for him. J.A. 26, 33, 67, 68; R. 1251. Despite the violence and neglect to which he had been exposed, Evan had only two prior juvenile adjudications for minor, nonviolent offenses – truancy and misdemeanor criminal mischief. R. 154-55.

As awful as the killing of Mr. Cannon itself surely was, does it provide a sufficient basis for the prediction that Evan is "the rare juvenile offender whose crime reflects irreparable corruption" (*Graham v. Florida*, 130 S. Ct. 2011, 2029 (2011), quoting *Roper v. Simmons*, 543 U.S. 551, 572 (2005))? More so than Evan's co-defendant, 16-year-old Colby Smith, whom the State allowed to plead to the lesser charge of felony murder and to receive a sentence of life *with* the opportunity for parole (R. 1000)? In all its graphic recounting of the crime, what has the State produced to put Evan Miller wholly outside the sphere of *Graham*'s perceptions that courts, let alone prosecutors, cannot "with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change,"[4] and that "an 'unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true

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[4] The basis upon which prosecutors make their decisions to seek a life-without-parole sentence or something less are unfathomable. A recent study of the sentences given teenagers accused of murder in Massachusetts "found no obvious pattern to explain why some killers got life without parole and others won lesser sentences" through prosecutorial charge reduction and plea bargaining. Sarah Favot, Kirsten Berg, & Jenna Ebersole, *Our Youngest Killers: Massachusetts Teens Sentenced to Life Without Parole Reveal Inequities in 1996 Law*, New England Center for Investigative Reporting, Dec. 27, 2011, ¶ 8, *available at* http://necir-bu.org/our-youngest-killers/.

depravity'" should require a less severe sentence (*Graham*, 130 S. Ct. at 2032, quoting *Roper*, 543 U.S. at 573)?

The *Graham* Court's perceptions find additional support in the reality that those procedures which produce judicial or prosecutorial assessments of lifelong incorrigibility are particularly error-prone because "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 130 S. Ct. at 2032. Only by ignoring these perceptions does "the evidence presented at [Evan Miller's] trial show[] why life without parole can be an appropriate punishment when 14-year-olds commit aggravated murder" (Ala. Resp't Br. 6).

2. Alabama's and Arkansas's Recycling of the Rejected Argument That the Confluence of Distinct State Laws (a) Permitting or Requiring Adult-Court Trial of Some Juveniles and (b) Authorizing or Requiring Adult Life-Without-Parole Sentences Reflects an Endorsement of Life Without Parole for Children

All parties to the *Miller* and *Jackson* cases agree that laws in 39 jurisdictions expose 14-year-olds to life-without-parole sentencing for murder as a consequence of the interaction between statutes providing for adult-court prosecution of some juveniles and other statutes punishing adult-court murder convictions with life without parole. Alabama and Arkansas

argue extensively that the existence of these statutes precludes the Court from finding a national consensus against life-without-parole sentences for these young teens. Ala. Resp't Br. 15-29; Ark. Resp't Br. 13-19.

The short, sufficient answer to this argument is that *Graham v. Florida* found a national consensus against life-without-parole sentences for juveniles convicted of nonhomicide crimes although such sentences were legislatively authorized in 39 jurisdictions: "[t]hirty-seven States as well as the District of Columbia . . . [and f]ederal law" (*Graham*, 130 S. Ct. at 2023).

Alabama seeks to distinguish *Graham* on the ground that fewer of the life-without-parole statutes there than here were mandatory. Ala. Resp't Br. 19-20. Its basic point seems to be that mandatory statutes (statutes which "make clear that once a defendant is transferred to the adult system and convicted . . . , the court has no choice but to impose a life-without-parole sentence" (*id.* at 20)) "'justify a judgment that . . . [the enacting Legislatures]' affirmatively 'intended to subject such offenders to life-without-parole sentences'" (*id.*), whereas the varying range of statutes within *Graham*'s purview of 39 – some discretionary, some mandatory, some "mandatory only when the nonhomicide offender had a criminal history that no one would expect to see from someone under age 18" (*id.* at 19) – generated only a *possibility* of life-without-parole sentencing of juveniles; and the *Graham* Court "concluded that this

mere possibility was not strong evidence that 'the legislatures in those jurisdictions' had 'deliberately concluded that it would be appropriate' to impose life-without-parole sentences on juveniles for non-homicide crimes" (*id.* at 20).

This analytic effort obfuscates the obvious. If a statute which exposes juveniles to a mandatory life-without-parole sentence demonstrated a deliberate legislative conclusion that *all* such juveniles deserved life without parole, then – to exactly the same extent and by exactly the same inference – a statute which exposes juveniles to a discretionary (or less than universal) life-without-parole sentence would demonstrate a deliberate legislative conclusion that *some* such juveniles deserve life without parole. Yet *Graham* found that 39 statutes exposing juvenile non-homicide offenders to life imprisonment without parole (some discretionary, some mandatory, some less-than-universally mandatory) did not defeat a finding of a national consensus pointing to an Eighth Amendment ban against sentencing *any* juvenile nonhomicide offender to life without parole. The reason for *Graham*'s finding was clearly stated and is simply ignored by Alabama's attempt to reduce *Graham* to a case about "mere possibility" as distinguished from some more-than-mere possibility.[5] The

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[5] We say "some more-than-mere possibility" rather than "certainty" because Alabama cannot seriously be contending that a statute which exposes juveniles to adult-court trial and thus to a mandatory life-without-parole sentence for certain crimes

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relevant passage in *Graham* bears quotation in full because it explicitly states that *Graham*'s basis for concluding that "[t]he evidence of consensus is not undermined by the fact that many jurisdictions do not prohibit life without parole for juvenile nonhomicide offenders" (130 S. Ct. at 2025) had nothing to do with Alabama's "mere possibility" theory. Referring to *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the *Graham* Court wrote:

> As is the case here, those States [whose statutes were considered in *Thompson*] authorized the transfer of some juvenile offenders to adult court; and at that point there was no statutory differentiation between adults and juveniles with respect to authorized penalties. The plurality concluded that the transfer laws show "that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*" 487

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reflects a legislative expectation that life-without-parole sentences will be a *certainty* for juveniles guilty of those crimes. Such a contention would ignore Alabama's own reliance on prosecutorial discretion as a part of its explanation for the extreme rarity of life-without-parole sentences imposed on young teens for murder (*see* Ala. Resp't Br. 1) although "enactments by 26 States and the federal government . . . make these punishments mandatory" whenever "juvenile judges transfer 14-year-olds and juries convict them of aggravated murders" (*id.* at 16).

> U.S., at 826, n. 24, 108 S. Ct. 2687. Justice O'Connor, concurring in the judgment, took a similar view. *Id.*, at 850, 108 S. Ct. 2687 ("When a legislature provides for some 15-year-olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. . . . [H]owever, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate").

Graham, 130 S. Ct. at 2025 (emphasis in *Thompson*).

In *Thompson* as in *Graham*, the Court flatly rejected the argument which Alabama once again advances here. *See Thompson*, 487 U.S. at 826 n.24 (plurality opinion); *id.* at 850-51 (Justice O'Connor, concurring and noting that "[t]here are many reasons, having nothing whatsoever to do with . . . [a choice of the appropriate punishment], that might motivate a legislature to provide as a general matter for some 15-year-olds to be channeled into the adult criminal justice process. The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders.

Such reasons would suggest nothing about the appropriateness of . . . [any specific] punishment for 15-year-olds.").[6]

Alabama's and Arkansas's contrary argument – that statutes providing for the prosecution of juveniles in adult court must be read as expressing a deliberate determination that the life-without-parole sentences prescribed for adult offenders are also appropriate for those juveniles – offends not only *Thompson* and *Graham* but common-sense plausibility. In 18 of the 39 jurisdictions to which they attribute this deliberate determination, the statutes which expose 14-year-olds to life without parole also expose 13-year-olds, 12-year-olds, 11-year-olds, and 10-year-olds to life without parole.[7] Is this Court therefore to

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[6] Alabama's own brief acknowledges that the 1990s' legislation readjusting the boundaries between juvenile-court jurisdiction and adult-court jurisdiction and thus exposing young adolescents to life-without-parole sentences were due to "concerns about increases in juvenile crime and a general sentiment that the law should hold these offenders responsible for their actions" (Ala. Resp't Br. 4), rather than to a specific determination that young adolescents should be sentenced to life imprisonment without parole.

[7] Del. Code Ann. tit. 10, § 1010; Fla. Stat. Ann. § 985.56(1); Haw. Rev. Stat. § 571-22(d)(1); Idaho Code Ann. § 20-509(1) (amended in non-pertinent part by S.B. 1219, 2012 Idaho Sess. Laws ch. 19); Me. Rev. Stat. Ann. tit. 15, § 3101; Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06(a)(2); Mich. Comp. Laws Ann. § 712A.2d; Neb. Rev. Stat. § 43-247; Nev. Rev. Stat. Ann. §§ 62B.330(3)(a), 194.010(1); 42 Pa. Cons. Stat. Ann. § 6302; R.I. Gen. Laws § 14-1-7; S.C. Code Ann. § 63-19-1210(6); S.D. Codified Laws §§ 22-3-1, 26-11-4; Tenn. Code Ann.

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suppose that the legislatures of these 18 States have deliberately determined that life imprisonment without the possibility of parole is sometimes appropriate for 10-year-olds? Or that the 13 States which punish adult homicides with life without parole and which set *no* minimum age for adult prosecution[8] have deliberately determined that life without parole is sometimes appropriate for prepubescent children?[9]

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§ 37-1-134(a)(1); Vt. Stat. Ann. tit. 33, § 5204(a); Wash. Rev. Code Ann. §§ 9A.04.050, 13.40.110; W. Va. Code Ann. § 49-5-10(e); Wis. Stat. Ann. § 938.183(1)(am).

[8] Delaware, Florida, Hawaii, Idaho, Maine, Maryland, Michigan, Nebraska, Pennsylvania, Rhode Island, South Carolina, Tennessee, and West Virginia. See the statutes of those States cited in note 7 *supra*.

[9] In six of these States – Delaware, Florida, Hawaii, Michigan, Nebraska, and Pennsylvania – life without parole is mandatory upon adult-court conviction for one or more specified categories of homicides. *See* Del. Code Ann. tit. 11, § 4209(a); Fla. Stat. Ann. § 775.082(1); Haw. Rev. Stat. § 706-656(1); Mich. Comp. Laws Ann. § 750.316; Neb. Rev. Stat. § 29-2522; 18 Pa. Cons. Stat. Ann. § 1102. These six States are among those to which Alabama refers in arguing that because "each [State] sets the minimum sentence for certain aggravated murders as life without parole," their statutes "evince shared legislative judgment that certain aggravated murders are so offensive to society's standards that life without parole is the minimum appropriate sentence, even when the defendant is as young as 14." Ala. Resp't Br. 19; *and see id.* at 20 (arguing that statutes which prescribe "mandatory-minimum sentences" of life without parole justify the conclusion that the legislatures which enacted them "affirmatively 'intended to subject such offenders to life without parole sentences' for aggravated murders"). Under Alabama's logic, the three additional States which mandate life-without-parole sentences for some murders and which expose children as young as the age of 10 to adult-court prosecution for

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"All would concede this to be unrealistic, but the[se] example[s] underscore[ ] that the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration." *Graham*, 130 S. Ct. at 2026.[10]

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murder – South Dakota, Vermont and Washington – should be viewed as affirmatively intending to imprison for their entire lives all children 10 and older who are found guilty of the specified murders. *See* S.D. Codified Laws §§ 22-6-1(1), 24-15-4; Vt. Stat. Ann. tit. 13, § 2311(c); Wash. Rev. Code Ann. § 10.95.030(1).

[10] Alabama also argues that a handful of sentencing statutes which mention juveniles indicate an express endorsement of life without parole for 14-year-olds. Ala. Resp't Br. 21-23. Several of these provisions make no reference whatsoever to life without parole. *See* 18 U.S.C. § 3591(a); Haw. Rev. Stat. § 706-667; Miss. Code Ann. § 99-19-15. Others were adopted simply to bring the State's statutes into compliance with this Court's decisions in *Roper* or *Graham*. *See* Conn. Gen. Stat. Ann. § 53a-46a(h)(1); Iowa Code Ann. § 902.1; Mo. Ann. Stat. § 565.020; N.C. Gen. Stat. Ann. § 14-17; Va. Code Ann. § 18.2-10; Wyo. Stat. Ann. § 6-2-101. Regardless, to the extent that these statutes may contemplate life without parole for *some juveniles*, it is far less clear that they contemplate it for children as young as 14 because, with the exception of Massachusetts (Mass. Gen. Laws Ann. ch. 119, § 72B), they set no minimum age for such sentences. And most of these jurisdictions, even including Massachusetts, have never imposed life without parole on a 14-year-old child. *See* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007) (no 14-year-olds serving life without parole in Connecticut, Hawaii, Wyoming, Virginia, Massachusetts, or federal system).

CONCLUSION

This Reply Brief and that in *Jackson* together address the criticisms which either Alabama or Arkansas have offered of the submissions in the interconnected[11] Briefs for the Petitioners in the two cases. These criticisms are insufficient to prevent this Court from granting relief to Petitioners and striking down the death-in-prison sentences imposed on these children.

Respectfully submitted,

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[11] *See* the Introductory Statement at page 2 of the Miller Pet'r Br.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-9646 & No. 10-9647

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On Writs of Certiorari to the Alabama Court of Criminal Appeals & Arkansas Supreme Court

BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, ADRIANA GALVÁN, MARGO GARDNER, CHARLES F. GEIER, FRANCES E. JENSEN, JACQUELINE MATTIS, PEDRO NOGUERA, BRUCE D. PERRY, AND VINCENT SCHMITHORST IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of adolescents?

2. Does imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide — a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances — violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are psychologists, social scientists, and neuroscientists who have devoted their careers to the study of adolescent behavior and development. In *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2009), the Court relied upon the substantial body of professional literature and scientific evidence confirming that adolescents are significantly different from adults in critical respects, which severely undermine the rationale for imposing our most severe sentences on adolescents and increase the prospects for their rehabilitation. *Amici* respectfully submit this Brief to update and further address this literature and evidence, which continues to support the logic of *Roper* and *Graham* and the conclusion that a sentence of life without the possibility of parole is unconstitutionally cruel when imposed on adolescents, regardless of the crime committed.

The logic of *Roper* and *Graham*, which fundamentally depends upon the unique nature of adolescents, supports the arguments of Petitioners Evan Miller and Kuntrell Jackson. Although adolescents should be held responsible for their actions, compared to adults they are neurologically predisposed to engage in risk-seeking and poor decision-making, highly susceptible to negative peer influence, and less able to understand the nature of the legal proceedings against them and therefore less

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[1] Pursuant to Rule 37.6, *Amici* state that no counsel for any party authored this Brief in whole or in part, and no person or entity other than *Amici* made a contribution to fund or intended to fund this Brief. Counsel for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

able to effectively aid in their own defense. Adolescents are highly malleable, however, and therefore responsive to rehabilitation and capable of profound change. To deprive adolescents, who are neurologically less capable than adults of acting rationally and understanding consequences, who are substantially affected by the influence of peers and their surroundings, and who are virtually certain to mature and evolve with support and proper environmental influence, of "any opportunity to achieve maturity of judgment and self-recognition of human worth and potential" is contrary to the standards of decency that define a just society.

Individual *Amici* are as follows:

- *J. Lawrence Aber* is Distinguished Professor of Applied Psychology and Public Policy at New York University's Steinhardt School of Culture, Education, and Human Development and Director of the Children's Institute at the University of Cape Town, South Africa. He is an internationally recognized expert in child development and social policy and testifies frequently before Congress, state legislatures, and other deliberative bodies. Professor Aber's research examines the influence of poverty and violence at the family and community levels on the social, behavioral, and cognitive development of children and youth. He also has designed and conducted evaluations of a variety of programs for children and youth, including violence prevention, literacy development, and antipoverty initiatives.
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- *Mary M. Brabeck* is Gale and Ira Drukier Dean of New York University's Steinhardt School of Culture, Education, and Human Development; Professor of Applied Psychology; and Fellow of the American Psychological Association and the American Educational Research Association. Dr. Brabeck is a scholar and leader in the fields of applied and developmental psychology. Her research focuses on intellectual and ethical development, values and conceptions of the moral self, and professional ethics. She has published more than 100 journal articles, books, and book chapters. She has an honorary degree from St.

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and the protective role of afterschool and extracurricular activities. Dr. Gardner has published numerous articles, including *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision-Making in Adolescence and Adulthood: An Experimental Study.* Her dissertation research on the etiology of juvenile offending was awarded the Hershel D. Thornburg Award by the Society for Research on Adolescence.

- *Charles F. Geier* is Assistant Professor of Human Development at the College of Health and Human Development of Penn State University. Dr. Geier's research focuses on developmental changes in basic cognitive and affective brain systems in adolescents and young adults. He is the author of numerous articles in the field of neural development.

- *Frances E. Jensen* is Professor of Neurology at Harvard Medical School's Department of Neurology and Director of Translational Neuroscience, Director of Epilepsy Research at Children's Hospital Boston, and Senior Associate Physician in Neurology at Children's Hospital Boston and Brigham and Women's Hospital. Dr. Jensen's research focuses on age-specific mechanisms in the developing brain related to stroke and epilepsy, as well as brain plasticity. In 2007, she received a Pioneer Award from the National Institute of Health to explore the interaction between epileptogenesis and cognitive dysfunction. Dr. Jensen has presented extensively on adolescent brain development. She is on the Governing Board of the American Epilepsy Society and the Governing Council for the Society for Neuroscience.

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- *Vincent Schmithorst* is Associate Professor at the University of Pittsburgh Medical Center's Department of Radiology. His research includes functional magnetic resonance imaging studies of pediatric subjects, white matter microstructure in the pediatric population, and novel image analysis techniques for use on neuroimaging data. He has published over sixty articles related to neuro and functional magnetic resonance imaging, including *Functional Connectivity in the Brain and Human Intelligence* and *White Matter Development During Adolescence as Shown by Diffusion MRI*. Dr. Schmithorst was awarded the "Editor's Choice Award" from the Organization for Human Brain Mapping.

SUMMARY OF ARGUMENT

The Court acknowledged in *Roper* and reaffirmed in *Graham* that adolescent offenders are inherently "not as morally reprehensible as . . . adult" offenders, relying in part upon scientific study demonstrating that adolescents' neurological maturity and development are significantly different from those of adults.[2] The body of scientific study has only deepened since those decisions and continues to confirm that compared with adults, the unique developmental characteristics of adolescents' brains lead to more impulsive behavior, the failure to comprehend consequences, and an underdeveloped sense of self, all of which may cause poor decisions and reckless actions. Adolescents also are particularly susceptible to negative environmental influences, which in turn may influence brain biology in a way that compounds the characteristics associated with their unique developmental stage. This distinction between the adolescent brain and the adult brain means that adolescent offenders are less culpable than adults and "cannot with reliability be classified among the worst of offenders."[3] This is true regardless of the crime committed.

Based upon this immature capacity and "diminished culpability," the Court has held that the death penalty cannot be imposed on adolescents, "no matter how heinous the crime."[4] For the same reasons, the Court has held that a sentence of life without parole, our "second most severe penalty," is

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[2] *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 561 (2005).

[3] *Graham*, 130 S. Ct. at 2026.

[4] *Roper*, 543 U.S. at 568.

unconstitutionally disproportionate for adolescents who commit non-homicide crimes — without regard to their heinousness or depravity.[5] The denial of all possibility of parole is particularly cruel in light of adolescents' unique capacity for change and rehabilitation, because a sentence of life without parole "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[6] Although *Amici* believe that adolescents can and should be held accountable for their actions, based on this logic, it is arbitrary and irrational to deny the possibility of parole solely to adolescent offenders whose crimes involved homicide.

This Brief focuses on the scientific and academic study post-*Graham* that confirms and extends our knowledge and understanding of adolescents' neurological, physiological, and psychological development. *First*, research continues to confirm that the process of adolescent brain development leads to greater vulnerabilities to high-sensation seeking behavior and less ability to fully comprehend consequences in comparison to adults. Recent studies have reinforced the conclusion that adolescents have a higher tendency to engage in risky behavior when faced with emotional or stressful situations. Environmental factors such as exposure to violence, peer influences, and availability of illegal substances only compound these deficiencies.

Second, ongoing research confirms that adolescents are highly amenable to rehabilitation and change. The very immaturity and plasticity that

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[5] *Graham*, 130 S. Ct. at 2027.

[6] *Id.* at 2032.

create an increased propensity for wrongdoing in adolescents also provide an enormous capacity for learning, development, and growth. Most adults understand and believe that the persons they were at age fourteen or fifteen are not the persons they are today. A sentence of life imprisonment without possibility of parole eliminates that opportunity for change and "forswears altogether the rehabilitative ideal."[7]

No penological goal is furthered by denying the possibility of parole to adolescents who receive life sentences. There is no retributive benefit to maximizing the punishment of the less culpable; and adolescents with underdeveloped rationality are unlikely to be deterred by losing the possibility of parole. At the same time, no legitimate interest is served by denying the prospect of rehabilitation to those most likely to respond to it, or by forever incapacitating those least likely to need it.

Third, to the extent one believes that some individuals even as adolescents are simply beyond hope (and *Amici* do not), our legal system is ill-equipped to identify those individuals at the time of trial. "[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[8] Even if courts had that ability, adolescents are far less capable of participating effectively in proceedings designed for adults, including by communicating with authority figures such as the police, judges, and their own

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[7] *Id.* at 2030.

[8] *Roper*, 543 U.S. at 573.

counsel. Fundamental fairness does not countenance requiring adolescent defendants to prove the impossible, years in advance, in the adult legal system. To the contrary, fairness and decency require an opportunity to demonstrate, at some point in their lives, that crimes committed as a child do not reflect their true, developed characters and should not doom them to die behind bars.

In sum, the imposition of a sentence of life without parole on adolescents is inconsistent with scientific understanding of human growth, does not further legitimate penological purposes, and is fundamentally unfair. The Court so held in *Graham* for the adolescent who commits any non-homicide crime, which may include depraved and despicable acts such as maiming, raping, and torturing. It is equally true for crimes involving homicide. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

ARGUMENT

I. SCIENTIFIC RESEARCH POST-*ROPER* AND *GRAHAM* CONTINUES TO CONFIRM THAT ADOLESCENTS ARE BIOLOGICALLY LESS DEVELOPED AND CONSEQUENTLY LESS CULPABLE THAN ADULTS.

The Court has several times observed "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[9] To support this observation, the Court in *Roper* and *Graham* relied upon a growing body of research regarding the development of the brain, which shows that

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[9] *Id.* at 569.

adolescents differ from adults in critical ways. That body of study has continued to grow since *Graham*, and continues to show that adolescent decision-making processes are significantly different than those of adults. Adolescents are more oriented toward high-sensation and novelty-seeking behavior and are more susceptible to environmental influences such as violent surroundings, peer pressure, and substance abuse. These observations are independent of the nature of the crime, and apply equally to adolescents involved in homicide and adolescents involved in other heinous crimes that do not involve death.

A. Differences in Neurological Development Lead to Greater Vulnerability for Risky and Reward-Seeking Behavior in Adolescents.

In holding that adolescents are inherently less culpable than adults, the Court in *Roper* and *Graham* observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,"[10] including differences in impulse and behavior control. Ongoing advances in research, including neuroimaging studies, decision-making task studies, and Diffusion Tensor Imaging ("DTI") studies, continue to confirm that adolescents' brains are not fully developed in unique ways that lead to a higher likelihood of risky behavior and make it "misguided to equate the failings of a minor with those of an adult."[11]

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[10] *Graham*, 130 S. Ct. at 2026.

[11] *Id.*

1. *Post-*Graham *Studies Reinforce that Adolescents' Unique Brain Development Leads to Greater Risk-Taking, Particularly in Stressful Situations.*

Two neurobiological systems underlie risky behavior: the prefrontal regulatory system (which is responsible for rational judgment and impulse control)[12] and the limbic system (which is responsible for emotional and reward-seeking behavior).[13] During adolescence, this "dual-system" is poorly balanced. Activity in the limbic system surges while the prefrontal regulatory system remains relatively immature. This is evident in functional magnetic resonance imaging ("fMRI") brain scans, which demonstrate that adolescents' brains are unlike those of adults or very young children: Adolescents' prefrontal regulatory systems are less effective at regulatory control than adults', and adolescents' limbic systems are more active than adults' or children's.[14] As a result of the slower growth of the impulse-control system relative to the reward-seeking system, adolescents are particularly vulnerable to

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[12] Leah Somerville et al., *Frontostriatal Maturation Predicts Cognitive Control Failure to Appetitive Cues in Adolescents*, 23 J. COGNITIVE NEUROSCI. 2123, 2123-24 (2011); Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 216-17 (2010).

[13] Steinberg, *supra* note 12, at 216-17; Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice*, 35 J. EXPERIMENTAL PSYCHOL. 709, 710 (2009)); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91-92 (2008).

[14] Todd Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63 BIOLOGICAL PSYCHIATRY 927, 932 (2008).

risk-taking and poor decision-making,[15] which may in the wrong circumstances contribute to delinquent behavior and which the Court has held means that "juvenile offenders cannot with reliability be classified among the worst offenders."[16]

Over the past decade, the scientific community has reached a consensus that the prefrontal regulatory systems of adolescents' brains develop more slowly than other neural systems, including systems that encourage risky and reward-seeking behavior.[17] Since *Graham*, studies continue to confirm that the prefrontal cortex is among the last regions of the brain to mature.[18] In fact, the prefrontal cortex is not fully mature until an

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[15] Somerville et al., *supra* note 12, at 2130-32; Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161-62 (2010); Figner et al., *supra* note 13, at 710-11; Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 218 (2009).

[16] *Graham*, 130 S. Ct. at 2026.

[17] *See, e.g.*, Steinberg, *supra* note 12; Sunita Bava & Susan Tapert, *Adolescent Brain Development and the Risk for Alcohol and Other Drug Problems*, 20 NEUROPSYCHOL. REV. 398 (2010); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); BJ Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain*, 10 DEVELOPMENTAL SCI. F8 (2007); Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296 (2006).

[18] Alison Burke, *Under Construction*, 34 INT'L J.L. & PSYCHIATRY 381, 383 (2011); Steinberg, *supra* note 15, at 161.

individual reaches his or her twenties.[19] Given the role of the prefrontal regulatory system in rational judgment and emotional control, reduced prefrontal activity is strongly linked to poor adolescent decision-making in the "heat of the moment."[20]

At the same time, adolescents are undergoing fundamental neural developments that render them more vulnerable to risk-taking,[21] including rapid development of the limbic system[22] and alteration of the dopaminergic neurotransmission, which is key to reward-seeking behavior.[23] In fact, high levels of dopamine in the region of the brain responsible for rational judgment and regulatory control peak during adolescence, further increasing propensity to engage in risky and novelty-seeking behavior.[24]

One recent study, the "Columbia Card Task" ("CCT") study, both reinforces prior findings on adolescent risk-taking, and confirms that adolescents take greater risks than adults when faced with emotional or stressful situations. The CCT study

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[19] *See, e.g.*, Jay Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 83 (2004); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8178 (2004).

[20] Hare et al., *supra* note 14, at 932-33.

[21] Somerville et al., *supra* note 12, at 2129-30; M. Asato et al., *White Matter Development in Adolescence*, 20 CEREBRAL CORTEX 2122, 2128 (2010).

[22] Hare et al., *supra* note 14, at 932.

[23] Monica Luciana, *Adolescent Brain Development*, 72 BRAIN & COGNITION 1, 3 (2010); Dustin Wahlstrom et al., *Developmental Changes in Dopamine Neurotransmission in Adolescence*, 72 BRAIN & COGNITION 146, 150-52 (2010).

[24] Wahlstrom et al., *supra* note 23, at 152.

tested the dual-system theory proposed in previous studies, such as the "Iowa Gambling Task" study, which were brought to the attention of the Court in *Graham*. In the Iowa Gambling Task study — thought to simulate real-life decision-making — participants were asked to choose playing cards from "good decks," which offered smaller one-time rewards but led to net gains over time, or "bad decks," which included potential for very large one-time rewards but generally led to net losses over time. Compared to adults, adolescents ages thirteen to fifteen took longer to choose from the good decks, demonstrating a heightened sensitivity to immediate rewards.[25]

The CCT study confirmed the findings in the Iowa Gambling Task study and provided additional data points by measuring risk-taking among younger adolescents, older adolescents, and adults. The CCT study recorded electrodermal activity during a card game through skin conductance response, a widely-used physiological measure of emotional arousal. Each participant was asked to decide whether to turn over a card in a display, where each card returned either a gain or a loss. Participants could stop at any point and claim a payoff. Because the likelihood of experiencing a loss increased with each card turned over, an individual's decision to turn over more cards reflected a riskier strategy.[26]

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[25] Eveline Crone & Maurits van der Molen, *Developmental Changes in Real Life Decision Making*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251, 252 (2004); *accord* Elizabeth Cauffman et al., *Age Differences in Affective Decision-Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010).

[26] Figner et al., *supra* note 13, at 712-15.

The CCT study included separate "hot" and "cold" versions of the experiment: The "cold" versions eliminated emotional triggers by requiring participants to proceed without feedback, while the "hot" versions triggered emotional decision-making by providing immediate feedback about each decision to turn over a card. The emotional triggers were designed to mimic the emotional pressure of day-to-day life decisions. The CCT study found, and additional studies have verified, that such "hot" experiments reliably trigger activity in the emotional centers of the brain. And in the "hot" experiments, both adolescent groups turned over more cards than adults.[27]

The CCT study confirmed that adolescents exhibit significantly greater risk-taking than adults when faced with emotional situations. This study also tested factors not previously tested, including adolescents' and adults' differing abilities to process probability, gain amounts, and loss amounts. While adults took into account all three factors, adolescents primarily took into account only probability, and loss and gain amounts had virtually no effect on adolescents' decisions. In short, the study substantiates that adolescents, relative to adults, are more heavily influenced by the emotional limbic system and do not consider all relevant factors when making risky decisions under stressful situations.[28]

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[27] *Id.*; *see e.g.*, A. Aron et al., *Human Midbrain Sensitivity to Cognitive Feedback and Uncertainty During Classification Learning*, 92 J. NEUROPHYSIOLOGY 1144 (2004); D. Shohamy, *Cortico-Striatal Contributions to Feedback-Based Learning*, 127 BRAIN 851 (2004).

[28] Figner et al., *supra* note 13, at 726-28.

2. *Post-*Graham *Studies Confirm that Adolescents' Brains are Less Capable of Impulse Control and Rational Judgment.*

Adolescents also are less capable than adults of controlling their impulses and engaging in rational decision-making because the white matter that transmits signals within the brain is relatively undeveloped. Gray matter in the brain represents information processing centers, while white matter coordinates how well these centers work together.[29] As a result of undeveloped white matter, the portion of the adolescent brain responsible for rational judgment and impulse control does not communicate with and control the emotional and reward-seeking portion of the brain as efficiently or effectively as an adult's.

Recent studies confirm that as adolescents' brains develop and white matter increases, the prefrontal regulatory system becomes better able to regulate the limbic system, which results in improved decision-making. As adolescents grow older, white matter increases and gray matter decreases. In particular, white matter increases through a process called "myelination," which speeds and improves information processing.[30] Myelination continues to occur through young adulthood[31] and is central to

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[29] Vincent Schmithorst & Weihong Yuan, *White Matter Development During Adolescence as Shown by Diffusion MRI*, 72 BRAIN & COGNITION 16, 16-19 (2010).

[30] Geier & Luna, *supra* note 15, at 216.

[31] Damien Fair et al., *Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1, 8 (2009).

effective cognitive control.[32] At the same time, gray matter decreases both naturally and through "synaptic pruning," whereby under-utilized synapses die off.[33] These processes have been found to continue into adulthood, especially in the frontal regions of the brain, supporting improvements in regulatory control.[34]

Since these phenomena were brought to the Court's attention in *Graham*, Diffusion Tensor Imaging ("DTI") has become a widely used method to measure white matter growth.[35] DTI is a sophisticated form of a well-established magnetic resonance imaging method called Diffusion-Weighted Imaging ("DWI")[36] and is one method of measuring connectivity between brain regions.[37] These DTI studies have shown a positive correlation between age and white matter volume, which increases into and through young adulthood, particularly in the regions responsible for impulse control and rational judgment.[38]

Other advances such as magnetic resonance imaging ("MRI") studies that test resting-state

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[32] Hare et al., *supra* note 14, at 932.

[33] Geier & Luna, *supra* note 15, at 216.

[34] M. Asato et al., *supra* note 21, at 2125-27.

[35] *Id.*; Schmithorst & Yuan, *supra* note 29, at 19; Thomas Paus, *Growth of White Matter in the Adolescent Brain*, 72 BRAIN & COGNITION 26, 27 (2010).

[36] J. Guadagno et al., *Progress in Imaging Stroke*, 65 BRITISH MED. BULL. 145, 147 (2003).

[37] BJ Casey et al., *Changes in Cerebral Functional Organization During Cognitive Development*, 15 NEUROBIOLOGY 239, 239 (2005).

[38] Schmithorst & Yuan, *supra* note 29, at 21; Asato et al., *supra* note 21, at 2125-27; Geier & Luna, *supra* note 15, at 216.

functional connectivity provide further understanding of relationships between brain regions, how they work together, and how they change with development.[39] One resting-state functional connectivity MRI study of 107 adolescents ages fourteen to nineteen revealed that young adolescents demonstrated patterns of connectivity between brain regions more similar to that of impulsive juvenile offenders, while that of older adolescents mirrored less-impulsive juvenile offenders.[40] The study found that "younger brains tend to have a 'more impulsive' pattern of . . . functional connectivity,"[41] supporting the conclusion that adolescents are neurologically less capable of impulse control than adults.

B. Adolescents are Uniquely Susceptible to Environmental Influences, Which Reinforce Neurological Differences.

The Court observed in *Roper* and *Graham* that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," than adults.[42] These negative influences impact adolescents' brain development. As a result of "plasticity," whereby the synapses grow and become stronger when used and weaken and die off when unused, adolescents' exposure to negative influences reinforces the effect of the adolescent brain's immature prefrontal regulatory system and

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[39] Fair et al., *supra* note 31, at 8.

[40] Benjamin Shannon et al., *Premotor Functional Connectivity Predicts Impulsivity in Juvenile Offenders*, 108 PROC. NAT'L ACAD. SCI. 11241, 11241-44 (2011).

[41] *Id.*

[42] *Graham*, 130 S. Ct. at 2026.

mature limbic system.[43] At the same time, however, the adolescent brain's plasticity allows for increased responsiveness to changing circumstances, supporting the conclusion that adolescents will respond to appropriate interventions and efforts at rehabilitation. Research continues to confirm this point.[44]

Of course, many who are born into difficult circumstances, experience challenging environments, or face peer pressure overcome those situations and reach adulthood without committing crimes. The question, however, is not whether those who fail to immediately overcome their circumstances should be held accountable for their actions; it is whether they must forever forfeit the opportunity, after appropriate punishment and intervention, to show that they have transcended their adolescent personality and circumstances and matured, developed, and changed.

1. *Environmental Factors, Often Beyond Their Control, Greatly Influence Adolescents' Development and Behavior.*

Scientists have amassed significant evidence that environmental experiences play a crucial role in shaping adolescents' brain development and affecting their behavior. Studies involving the observation of adolescents from childhood to adulthood have shown, for example, a correlation between delinquent

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[43] Robert Anda et al., *The Enduring Effects of Childhood Abuse and Related Experiences*, 256 EUROPEAN ARCHIVES PSYCHIATRIC & CLINICAL NEUROSCI. 174, 181 (2006).

[44] *See* Mark Lipsey et al., *Effective Intervention for Serious Juvenile Offenders*, JUV. JUST. BULL. 4-6 (2000); *see also* Sue Ramsden et al., *Verbal and Non-Verbal Intelligence Changes in the Teenage Brain*, 479 NATURE 113, 113-15 (2011).

behavior and trauma.[45] One study showed that 92.5% of 898 adolescent detainees previously experienced traumatic events such as witnessing assault or murder, being threatened with a weapon, or being forced into sexual acts.[46] The trauma of witnessing violence was far more common among this sample of adolescents in juvenile detention (74.9% of males and 63.5% of females) than in the general community (4.9%-40.1%).[47] In another study of trauma among male delinquents ages twelve to seventeen, 76% reported witnessing violence, which was defined as having observed someone being shot, stabbed, sexually assaulted, mugged, robbed, or threatened with a weapon.[48]

These studies also show a correlation between adolescent delinquent behavior and a violent home life. One meta-analytic study analyzing 118 studies on the effects of aggression in the home found that 63% of children who witnessed violence between their parents faced increased difficulties in their psychosocial development, including psychological, social, and academic problems, in comparison to a group who had not been exposed to similar violence.[49] Another meta-analytic study produced consistent results, demonstrating that exposure to violence between parents is associated with an increased risk

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[45] *See* Tina Maschi, *Unraveling the Link Between Trauma and Male Delinquency*, 51 SOC. WORK 59, 62-63 (2006).

[46] Karen Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403, 405, 407 (2004).

[47] *Id.*

[48] Maschi, *supra* note 45, at 62-63.

[49] Katherine Kitzmann et al., *Child Witnesses to Domestic Violence*, 71 J. CONSULTING & CLINICAL PSYCHOL. 339, 339, 345 (2003).

of emotional and behavioral problems during adolescence.[50]

The more often adolescents are exposed to threatening environments the more quickly their brains learn to respond to those threats.[51] Frequent exposure to threatening or violent environments strains adolescents' immature prefrontal lobes, which further impairs adolescents' ability to control their impulses.[52] Adolescents who have witnessed aggression and violence or who have been subjected to physical maltreatment in early years are likely to develop a pattern of behavior that includes hypervigilance to threat cues, erroneous attribution of hostile intent to others, choosing aggressive solutions to interpersonal problems when nonviolent solutions are available, and finding the results of aggressive behavior self-satisfying and positive. This pattern, in turn, may lead to later violent behavior.[53]

Research also shows, however, that interventions — which correct for negative environmental factors by teaching parents to control violent behaviors and teaching children new patterns of processing social information — can reduce delinquent behavior, even for the most difficult

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[50] Sarah Evans et al., *Exposure to Domestic Violence*, 13 AGGRESSION & VIOLENT BEHAV. 131, 133, 136-37 (2008).

[51] R. Post, *Transduction of Psychosocial Stress into the Neurobiology of Recurrent Affective Disorder*, 149 AM. J. PSYCHIATRY 999, 1004-05 (1992).

[52] Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949, 953 (2007).

[53] Gregory Pettit et al., *Domain Specificity in Relationship History, Social-Information Processing, and Violent Behavior in Early Adulthood*, 89 J. PERSONALITY & SOC. PSYCHOL. 190, 191-92 (2010).

adolescents.[54] For example, one study found that the "Nurse Family Partnership," in which a nurse provides child-care training and social skills development for at-risk mothers during the first two years of their children's lives, reduced the risk of the children's arrest by age fifteen.[55] A subsequent study showed that Conduct Disorder, a high-risk psychiatric condition in which a child repeatedly violates basic social rules and which was once believed to be impervious to treatment, is treatable through intervention.[56] And a recent trial involving 891 children reported that an intervention effort designed to help the parents of highest-risk five-year-olds stop harsh physical discipline, as well as help those children learn skills to prevent the development of aggressive behavior, reduced by 47% the likelihood that the children would commit violent crimes by age eighteen.[57] The success of interventions reflects that

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[54] Conduct Problems Prevention Research Group, *Fast Track Intervention Effects on Youth Arrests and Delinquency*, 6 J. EXPERIMENTAL CRIMINOLOGY 131 (2010); Conduct Problems Prevention Research Group, *Fast Track Randomized Controlled Trial to Prevent Externalizing Psychiatric Disorders*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1250 (2007); U.S. PUB. HEALTH SERV., YOUTH VIOLENCE (2001); John Paul Wright & Francis Cullen, *Parental Efficacy and Delinquent Behavior*, 39 CRIMINOLOGY 677 (2001).

[55] Peter Greenwood & Susan Turner, *Juvenile Crime and Juvenile Justice*, *in* CRIME AND PUBLIC POLICY 120 (James Wilson & Joan Petersilia eds., 2011); David Olds et al., *Long-Term Effects of Nurse Home Visitation on Children's Criminal and Antisocial Behavior*, 280 J. AM. MED. ASSOC. 1238, 1241 (1998).

[56] Paul Frick, *Effective Interventions for Children and Adolescents With Conduct Disorder*, 46 CANADIAN J. PSYCHIATRY 597, 605 (2001).

[57] Conduct Problems Prevention Research Group, *Fast Track Intervention Effects*, *supra* note 54, at 150.

the same brain plasticity that renders adolescents susceptible to environmental experiences makes them capable of rehabilitation and reform.[58]

2. *Recent Scientific Research Confirms that Adolescents are Unusually Susceptible to Negative Peer Influence.*

As the Court recognized in *Roper* and reaffirmed in *Graham*, adolescents "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[59] In fact, adolescents who commit crimes typically act in peer groups.[60] This observation is consistent with general experience and common sense, and has been confirmed by a substantial body of academic research.[61] Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior[62] and is a consistent predictor of

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[58] Bruce Perry, Maltreatment and the Developing Child (Sept. 23, 2004), *in* THE MARGARET MCCAIN LECTURE SERIES, 2005.

[59] *Roper*, 543 U.S. at 569.

[60] Dustin Albert & Laurence Steinberg, *Peer Influences on Adolescent Risk Behavior*, *in* INHIBITORY CONTROL AND DRUG ABUSE PREVENTION 212 (Michael Bardo et al. eds., 2011); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 4 DEVELOPMENTAL PSYCHOL. 625, 626 (2005).

[61] *See e.g.*, UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS (Mitchell Prinstein & Kenneth Dodge eds., 2008); Philip Cook et al., *The Negative Impacts of Starting Middle School in the Sixth Grade*, 27 J. POL'Y ANALYSIS & MGMT. 104 (2008); DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH (Kenneth Dodge et al. eds., 2006); Gardner & Steinberg, *supra* note 60.

[62] *See, e.g.*, Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1 (2011); *see generally* DEVIANT PEER INFLUENCES, *supra* note 61.

adolescent delinquency.[63] Peer-influenced delinquent behavior as a result of the influence of older peers is particularly acute.[64]

Recent MRI tests confirm a long line of studies demonstrating both the neurological foundation for adolescents' reduced impulse control when faced with peer pressure and the link between susceptibility to peer pressure and delinquent behavior.[65] The mere presence of peers may push adolescents toward risky behavior.[66] In one study, researchers measured the brain activity of adolescents and adults as they made decisions in a simulated driving game.[67] Participants were required to reach the end of a track as quickly as possible and were forced to decide whether to run a yellow light at an intersection. The participants played the game either alone or with two peers. Consistent with past findings,[68] this study found that only adolescents took a greater number of risks in the

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[63] Albert & Steinberg, *supra* note 60, at 212; Mary Gifford-Smith et al., *Peer Influence in Children and Adolescents*, 33 J. ABNORMAL CHILD PSYCHOL. 255, 255-58 (2005).

[64] David Harding, *Violence, Older Peers, and the Socialization of Adolescent Boys in Disadvantaged Neighborhoods*, 74 AM. SOC. REV. 445 (2009); Cook et al., *supra* note 61, at 118-19; Scott Leatherdale, *The Influence of Friends, Family, and Older Peers on Smoking Among Elementary School Students*, 42 PREVENTIVE MED. 218, 221 (2006).

[65] Chein et al., *supra* note 62, at F7-F8; Steinberg, *supra* note 15, at 162; Marie-Helene Grosbras et al., *Neural Mechanisms of Resistance to Peer Influence in Early Adolescence*, 27 J. NEUROSCI. 8040, 8040 (2007); Suparna Choudhury et al., *Social Cognitive Development During Adolescence*, SOC. COGNITIVE & AFFECTIVE NEUROSCI. 165, 171 (2006).

[66] Gardner & Steinberg, *supra* note 60; *see also* Albert & Steinberg, *supra* note 60, at 212.

[67] Chein et al., *supra* note 62, at F2-F3.

[68] Gardner & Steinberg, *supra* note 60.

presence of peers. In fact, adolescents took twice as many risks when they knew peers were watching. Furthermore, the regions of the brain associated with emotion and reward-seeking were activated to a greater degree when adolescents knew they were being observed by peers.[69]

In addition, adolescents' reduced ability to control impulses when faced with peer pressure may lead to alcohol use and abuse, which increases the likelihood of delinquent behavior.[70] In turn, alcohol abuse enhances the uneven development of adolescents' brains by overpowering normal chemistry and blocking growth in the underdeveloped logic centers.[71] As a result, adolescent alcohol abuse is both a by-product of a still-maturing prefrontal cortex and a contributing factor to poor decision-making. Yet, studies and statistics show that while both substance use problems and delinquency start and fuel each other during mid-adolescence, they often cease by early adulthood.[72]

II. None of the Goals of Penal Sanctions Justifies Life Without Parole for Juvenile Offenders, Regardless of the Crime Committed.

The Court in *Graham* concluded that none of the goals of penal sanctions is furthered by denying the possibility of parole to adolescent offenders for

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[69] Chein et al., *supra* note 62, at F7.

[70] Edward Mulvey et al., *Substance Use and Delinquent Behavior Among Serious Adolescent Offenders*, Juv. Just. Bull. 3 (2010).

[71] Bava & Tapert, *supra* note 17, at 403-05; Mulvey et al., *supra* note 70, at 4.

[72] Mulvey et al., *supra* note 70, at 4.

non-homicide offenses, because adolescents are less culpable and more susceptible to rehabilitation than adults. "Life without parole sentences share some characteristics with death sentences that are shared by no other sentences," including "alter[ing] the offender's life by a forfeiture that is irrevocable," and "depriv[ing] the convict of the most basic liberties without giving hope of restoration."[73] In short, a life without parole sentence "means denial of hope."[74] This logic applies to all adolescent offenders, not just to those convicted of non-homicides.

No scientific study suggests that adolescents involved in homicide crimes are situated differently from other adolescents with respect to emotional and intellectual maturity or brain development. While crimes involving homicide are among the most serious under the law, the factors that reduce culpability in adolescence exist regardless of the crime. There is no retributive benefit to maximizing the punishment of the less culpable; and adolescents' underdeveloped rational decision-making is unlikely to be deterred by the potential impact of losing the possibility of parole. At the same time, because adolescents have great potential for rehabilitation, they are least likely to require lifetime incapacitation.

Sentencing adolescents to life without parole is especially perverse from a rehabilitative standpoint, because compared to adults, adolescents are particularly amenable to change as they mature and develop. Studies demonstrate that most adolescents will "age out" of their risk-taking behavior, fully develop their ability to control impulses, and respond

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[73] *Graham*, 130 S. Ct. at 2027.

[74] *Id.*

to meaningful incentives and opportunities to succeed.[75] Studies and statistics confirm that crime rates typically rise in early adolescence, peak during mid-to-late adolescence, and then decline.[76] Research indicates that most violent adolescent offenders' "criminal careers" span a period of less than one year.[77] Thus, a large majority of young adolescents will limit their deviant and anti-social behaviors to the adolescent years.[78]

Studies also demonstrate that adolescents can recover and reform delinquent behavior.[79] Rehabilitative programs have proven highly effective for even the most serious adolescent offenders. For example, multiple trials have shown that Multi-Systemic Therapy ("MST"), an intensive family- and community-based treatment program designed specifically to address serious antisocial behaviors of at-risk youth by making positive changes in social systems such as the home, school, community, and peer relations, results in substantially reduced

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[75] Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior*, 100 PSYCHOL. REV. 674, 692-94 (1993); *See* Gardner & Steinberg, *supra* note 60, at 632.

[76] *See* U.S. DEP'T OF JUSTICE, OJJDP STATISTICAL BRIEFING BOOK, AGE-SPECIFIC ARREST RATE TRENDS (2011); *see also* Burke, *supra* note 18, at 384; Conduct Problems Prevention Research Group, *Fast Track Intervention Effects*, *supra* note 54, at 132; Moffitt, *supra* note 75, at 675.

[77] Richard A. Mendel, LESS HYPE MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS – AND WHAT DOESN'T 15 (Am. Youth Policy Forum et al. eds., 2000).

[78] Burke, *supra* note 18, at 384.

[79] *Id.*; Sonja Schoenwald et al., *Inside Multisystemic Therapy*, 8 J. EMOTIONAL & BEHAV. DISORDERS 113, 113-14 (2000).

recidivism rates.[80] One meta analysis of fifty-eight experimental and quasi-experimental studies has shown that Cognitive Behavioral Therapy ("CBT"), a form of psychotherapy that uses a variety of techniques to learn goals and improve skills so that an individual can achieve those goals, is most successful for high-risk individuals.[81] A comprehensive and well-regarded study providing an overview of meta-analytic studies found that rehabilitation programs were effective, supporting the general conclusion that rehabilitation treatment is capable of reducing the re-offense rates of convicted offenders.[82]

Simply put, adolescent offenders are highly likely to respond to rehabilitative efforts over the course of their lives as they grow, mature, learn, and change. As the Court observed in *Graham* for non-homicide offenders, the Eighth Amendment "forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society" by forever denying the possibility of parole.[83]

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[80] Mark Lipsey & Francis Cullen, *The Effectiveness of Correctional Rehabilitation*, 3 ANN. REV. L. & SOC. SCI. 297, 308 (2007); Schoenwald et al., *supra* note 79, at 113-14.

[81] Nana Landenberger & Mark Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders*, 1 J. EXPERIMENTAL CRIMINOLOGY 451, 471 (2005); *see also* Lipsey & Cullen, *supra* note 80.

[82] Lipsey & Cullen, *supra* note 80, at 314.

[83] *Graham*, 130 S. Ct. at 2030.

III. THE SAME DEFICIENCIES THAT AFFECT ADOLESCENT DECISION-MAKING AND BEHAVIOR MAKE THEM LESS ABLE TO AID IN THEIR OWN DEFENSE.

In *Roper* and *Graham*, the Court considered and rejected taking a case-by-case approach to maturity and culpability during sentencing for adolescents, because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,"[84] and because a case-by-case approach "does not take account of special difficulties encountered by counsel in juvenile representation."[85] This same difficulty counsels against taking a case-by-case approach here.

The Court in *Graham* acknowledged what scientific and clinical studies have confirmed: "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."[86] Fairness counsels strongly against allowing a lifetime forfeiture against those who, due to their youth and inexperience, are less able to participate effectively in the proceedings against them, less able to consult with counsel, and less able to assist in preparing their defense.

First, adolescents are far less capable than adults of understanding the nature of the legal proceedings against them — including the charges pending, the costs and benefits of available pleas, the import of potential penalties, and their

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[84] *Roper*, 543 U.S. at 573.

[85] *Graham*, 130 S. Ct. at 2032.

[86] *Id.*

constitutionally guaranteed rights.[87] According to one study, only 45% of adolescents compared with 74% of adults demonstrated an understanding of the *Miranda* warnings.[88] In addition, adolescents may often mistakenly believe that they will be punished for exercising their legal rights. In one study, only one-third of 199 adolescents, compared to two-thirds of 260 adults, recognized that they would not be punished by a judge for asserting their right to remain silent.[89] These phenomena have been documented for decades.

Recent studies continue to confirm these conclusions. In one 2007 study, 78% of defendants ages eleven to thirteen demonstrated an "impaired" understanding of their *Miranda* rights, compared to 63% of defendants ages fourteen to fifteen and 35% of defendants ages sixteen to seventeen.[90] Not surprisingly, those who are least able to understand their rights are most likely to waive them. A 2005 study reported that 86% of adolescents ages eleven to seventeen detained in a juvenile facility had waived their right to remain silent.[91]

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[87] *See generally* YOUTH ON TRIAL (Thomas Grisso & Robert Schwartz eds., 2000).

[88] Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 12 (1997).

[89] *See* Thomas Grisso, JUVENILES' WAIVER OF RIGHTS 124 (Plenum Publ'g Corp. 1981).

[90] Jodi Viljoen et al., *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants*, 25 BEHAV. SCI. & L. 1, 9 (2007).

[91] Jodi Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants*, 29 L. & HUM. BEHAV. 253, 255, 261 (2005).

Second, adolescents are at greater risk of misunderstanding the role of their counsel. Effective trial participation requires "a personally relevant understanding of the lawyer's advocacy role and the confidential nature of the attorney-client relationship, as well as comprehension of one's own directive role in the process."[92] Because adolescent defendants often lack these capacities, they may question an attorney's allegiance and withhold relevant information out of fear that it will be used against them.[93] One study of fifty adolescents ages twelve to eighteen showed that while 92% reported that they believed attorney-client confidentiality prevented their attorney from disclosing their conversations, 26% also believed that a lawyer could disclose any information to a judge, and 30% also believed that a lawyer could tell their parents what they had said.[94] Another found that 28% of nearly 200 adolescent offenders, as compared to only 6% of 260 adult offenders, believed that confidentiality did not apply if the lawyer was aware of the client's guilt.[95] This is especially true for adolescents represented by public defenders.[96]

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[92] Melinda Schmidt et al., *Effectiveness of Participation as a Defendant*, 21 BEHAV. SCI. & L. 175, 177 (2003).

[93] *Id.*

[94] Michele Peterson-Badali et al., *Young People's Experience of the Canadian Youth Justice Systems*, 17 BEHAV. SCI. & L. 455, 461 (1999).

[95] Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, 68 CAL. L. REV. 1134, 1158 (1980).

[96] Donna Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capabilities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 164-65 (2007).

Third, adolescents are "less likely than adults to work effectively with their lawyers to aid in their defense."[97] The Court has long recognized that adolescents have special needs in the legal process and require the "guiding hand of counsel at every step in the proceedings against [them]."[98] Adolescents' immaturity affects their ability to communicate meaningfully with counsel, to provide counsel with information relevant to their defense, and to preserve the attorney-client relationship.[99] Adolescents lack adult levels of concentration and memory, which impedes their ability to provide information regarding events relevant to the crime.[100] Moreover, their lack of life experience can prevent them from recognizing exculpatory facts. For instance, one study using structured interviews to examine the relationship between developmental immaturity and the ability to participate in trial demonstrated that adolescents ages eleven to thirteen were significantly less able to recognize information relevant to their defense than adolescents ages fourteen to fifteen, who in turn demonstrated significantly poorer reasoning and recognition of relevant information than adolescents aged sixteen and older.[101]

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[97] *Graham*, 130 S. Ct. at 2032.

[98] *In re Gault*, 387 U.S. 1, 36 (1967).

[99] Steinberg, *Adolescent Development and Juvenile Justice*, supra note 17, at 475.

[100] *Id.*; Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, PUB. L. & LEGAL THEORY WORKING PAPER SERIES 29 (2004).

[101] *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 L. & HUM. BEHAV. 333, 343 (2003); *see also* Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 17, at 476.

Fourth, the same cognitive deficiencies that impair adolescents in the first place also impair their ability to perform in legal proceedings because they attach more value to short-term results than to long-term consequences than adults.[102] For example, adolescents may be more likely to seek immediate gains such as curtailment of difficult questioning.[103] In an interview of 183 adolescents who were considering waiving their *Miranda* rights, the most frequent concern was "Will I spend the night in jail (detention), or will the police release me to return home?"[104] Another study of 927 adolescents ages eleven to seventeen and 466 adults ages eighteen to twenty-four found that during hypothetical situations involving police interrogation, consultation with a defense attorney, and evaluation of a plea agreement, adolescents performed worse than adults in selecting optimal choices and evaluating future risks, while they were substantially more likely than adults to make choices in conformity with the perceived desires of authority figures.[105] Approximately one-fifth of the adolescents were as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adult subjects who would be incompetent to stand trial.[106]

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[102] Schmidt et al., *supra* note 92, at 191.

[103] *Id.*

[104] *See* Grisso, *supra* note 89, at 151.

[105] *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 101, at 352; *see also* Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 17, at 476.

[106] *Id.*

CONCLUSION

Scientific research continues to confirm that there is a neurological basis for adolescents' poor decision-making and risky behavior, which over time will reduce as they develop and learn from their environment. Adolescence is a period of tremendous change, and a sentence of life without parole for adolescents convicted of homicide would work the same denial of "opportunity to achieve maturity of judgment and self-recognition of human worth and potential" that the Court found cruel and unusual in *Graham*.[107] These factors are a function of the nature of adolescents generally, and apply without regard to whether an adolescent's crime involves homicide. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

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[107] *Graham*, 130 S. Ct. at 2032.

Respectfully Submitted,

January 17, 2012

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
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Nos. 10-9646 and 10-9647

In the Supreme Court of the United States

EVAN MILLER,
Petitioner,,

v.

STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to
The Alabama Court of Criminal Appeals

KUNTRELL JACKSON,
Petitioner,

v.

RAY HOBBS,
Respondent.

On Writ of Certiorari to
The Supreme Court of Arkansas

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

(Counsel for Amicus Curiae *listed inside front cover)*

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or other mitigating circumstances?

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioners. The ABA requests this Court to reverse the decisions below and extend its decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), to hold that a sentence of life imprisonment without the possibility of parole for a juvenile offender convicted of homicide is impermissible under the Eighth and Fourteenth Amendments of the United States Constitution.

The ABA is the largest voluntary professional membership organization and its nearly 400,000 members constitute the leading association of legal professionals in the United States. The ABA's members come from each of the fifty states, the District of Columbia, and the U.S. Territories. Its members include judges, prosecutors, defense lawyers, lawyers in private practice, as well as those in corporations, non-profit

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

organizations, and government agencies.[2] The ABA also includes lawyers involved in correctional facilities and parole boards, as well as legislators, law professors, and law students. Since its inception, this wide cross-section of legal professionals has sought to "[w]ork for just laws, including human rights, and a fair legal process."[3]

The ABA, through its Criminal Law Section, has always taken an active role in advocating for the improvement of the criminal justice system, with a special interest in the improvement of the juvenile justice system through its Juvenile Justice Committee. This committee is composed of stakeholders participating in the juvenile justice system, including both adult and juvenile judges, and lawyers involved in all aspects of the issues facing children in the juvenile justice process.

The ABA's research, investigation and experience of its members, along with its study of developments in juvenile justice law, and scientific and psychological studies regarding the differences between children and adults, has informed the ABA's continuing development of ABA policies relating to the sentencing of children. In addition,

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Jan. 11, 2012).

the ABA devoted over nine years working with the Institute of Judicial Administration ("IJA") on the development of standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA *Juvenile Justice Standards* and republication in 1996.[4]

The ABA drew upon this varied and rich experience in its *amicus curiae* briefs in *Graham*, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the ABA discussed its sentencing policies that reflect factors rendering juvenile offenders less morally culpable, and more capable of rehabilitation than adults convicted of the same crimes, including homicide. *See* ABA Briefs in *Graham*, 2009 WL2197339 and *Roper*, 2004 WL 1617399, *available at*

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[4] Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards, Annotated: A Balanced Approach* (Robert E. Shepherd, Ed. 1996), available at https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf (last visited Jan. 12, 2012). They resulted from an exhaustive historical, legal and criminological study of society's response to juvenile crime and were developed through the efforts of broadly representative task forces made up of juvenile judges, prosecutors, defense lawyers, law professors, experts and public groups that have an interest in the juvenile justice system. They were adopted as ABA policy by the ABA House of Delegates ("HOD"), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See House of Delegates - General Information*, American Bar Association, http://www.americanbar.org/groups/leadership/delegates.html (last visited 1/9/12).

http://www.abanet.org/amicus/briefs98-03.html (last visited Jan. 11, 2012).

SUMMARY OF ARGUMENT

The ABA respectfully submits that while this Court limited its holding in *Graham* to juveniles convicted of non-homicide offenses, every characteristic and difference between children and adults identified in *Roper* and *Graham* that supports this Court's conclusion that juveniles are less morally culpable and have a greater capacity for rehabilitation than adults also supports an extension of *Graham's* holding to all juveniles regardless of whether they were convicted of homicide. Similarly, *Graham's* holding that the standard penological justifications of sentencing are not served by juvenile life without parole ("JLWOP") sentences applies with equal force to juveniles convicted of homicide. Moreover, the exclusion of juveniles convicted of homicide from the protection of *Graham* does not comport with the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560-61. Each of these arguments for extending *Graham* to juveniles convicted of homicide is supported by the ABA's research, investigation and the experience of its members in formulating, adopting and periodically reviewing the ABA's *Juvenile Justice Standards*, which specifically include standards for sentencing.

Moreover, the ABA urges a conclusion that a JLWOP sentence is unconstitutional even for juveniles convicted of homicide crimes based on the

fact that neither public safety nor penal objectives would be compromised by allowing the chance for parole. Further, consideration should be given to the overwhelming opposition to JLWOP demonstrated by international authorities.

While the Petitioners may focus on the constitutionality of JLWOP as applied to fourteen year old children under particular circumstances, the ABA requests, for the reasons set forth herein and consistent with the consensus of medical and behavioral scientists as to a child's brain development, that this Court hold categorically that a JLWOP sentence for any child under the age of eighteen for any crime is unconstitutional.

The ABA is not asserting that all juveniles should be entitled to parole, but only that they should not be denied the opportunity to be considered for parole before they die in prison. The need for such protection for juvenile offenders is made more compelling by the fact that many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults before trial judges with no discretion to sentence them to anything but life without the possibility of parole. Thus, many trial judges are stripped of any opportunity to consider the backgrounds, developmental differences or other mitigating factors of youth that this Court, the scientific community, and the ABA have recognized.

ARGUMENT

JLWOP CATEGORICALLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. THE ABA'S INVESTIGATION, RESEARCH AND THE EXPERIENCE OF ITS MEMBERS SUPPORT A REJECTION OF JLWOP SENTENCES.

This Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before age 18, *Roper*, 543 U.S. 551, and JLWOP for defendants convicted of non-homicide crimes committed before age 18, *Graham*, 130 S. Ct. 2011. This Court has recognized "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (citing *Trop v. Dulles*, 356 U.S. 86. at 100-01 (plurality opinion)). As the Court held, "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Graham*, 130 S. Ct. at 2021 (citations omitted).

Consistent with this Court's conclusions in *Roper* and *Graham*, and based on the research and guidance provided by its members active in the juvenile justice system, the ABA maintains that JLWOP sentences cannot comport with the the lesser culpability of juvenile offenders, and

therefore, should not be permissible regardless of the crime, including homicide. While recognizing that some juvenile offenders deserve severe punishment for their crimes, the ABA nevertheless concluded in 1980 that when they are compared to adults, their reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others, among other factors – renders them less morally culpable than adults. *See, e.g.*, IJA/ABA *Juvenile Justice Standards Relating to the Transfer Between Courts* at 3 (1980), available at https://www.ncjrs.gov/pdffiles1/ojjdp/82487.pdf (last visited Jan. 11, 2012). That is, children must be treated differently than adults in our justice system:

> The unifying thread to all twenty-three volumes was that we – the adult world – had the right to judge and punish youthful wrongdoers, but we also had responsibilities for adjudicating children fairly, for intervening in families in ways that would be salutary, not punitive and destructive, and for treating youths who must be removed from society in a manner which did not derogate their humanity and guarantee them a pass to the nearest penitentiary.[5]

Subsequently, in 1997, in response to a growing number of state statutes and policies that allowed the transfer for prosecution and sentencing

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[5] *Juvenile Justice Standards*, supra note 4, at xii.

of child offenders to the adult criminal justice system, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, ABA, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001). In formally adopting the Task Force's conclusions in 2002, the ABA recognized, *inter alia*, that (a) "youth are developmentally different from adults and these differences should be taken into account", and (b) "judges should consider the individual characteristics of the youth during sentencing."[6]

Following this Court's affirmation of these principles in *Roper*, 543 U.S. 551, and an assessment of studies from the behavioral scientific community, the ABA adopted in February 2008 an additional policy specifically addressing sentence mitigation for juvenile offenders. ABA, *2008 Report with Recommendation #105C* at 2 (Policy adopted Feb. 2008) [hereinafter the "Report"].[7] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

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[6] ABA, *Report with Recommendation #101D* (Policy adopted Feb. 2002), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/jj101d.authcheckdam.pdf (last visited Jan. 11, 2012).

[7] *Available at* http://www2.americanbar.org/sections/criminaljustice/CR200000/Pages/default.aspx (last visited Jan. 11, 2012).

As noted in the Report at 6, the ABA's opposition to JLWOP sentences dates back to the ABA's adoption in 1991 of a policy that endorsed the United Nations Convention on the Rights of the Child. With the ABA's long history of work in juvenile justice as its basis, the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. *Id.* at 6.[8]

As this Court concluded in *Roper* and again in *Graham*, juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. *Roper*, 543 U.S. at 569-70; *Graham*, 130 S.Ct. at 2026.

Informed by its history of working in juvenile justice and by input from the medical and behavioral scientists, the ABA similarly has concluded that: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; and (2) sentences for juveniles should recognize the key mitigating considerations relevant to their youthful status, including those identified by the Court in *Roper*, 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and

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[8] The ABA has continued to adopt policies based on the characteristics of youth, most recently the ABA Report with Recommendation #102B (Policy adopted Feb. 2010), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102B.authcheckdam.pdf (last visited Jan. 12, 2012), urging the development of simplified *Miranda* warnings for juveniles, in light of their more limited verbal comprehension levels.

criminal history of the juvenile; and (3) sentences even for those convicted of the worst crimes, including homicide, cannot be based on a prediction of what kind of adult the juvenile may become. Accordingly, and as has been the ABA's position since 1991, a JLWOP sentence cannot be supported for any juvenile. Rather, juveniles should be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.[9]

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[9] ABA, *Report with Recommendation #105C*, at 9 (Policy adopted Feb. 2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc (last visited Jan. 11, 2012) (relying, *inter alia*, upon research including MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 3: Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. & L. 742 (2000); William Gardner and Janna Herman, *Adolescent's AIDS Risk taking: A Rational Choice Perspective, in Adolescents in the AIDS Epidemic* 17, 25-26 (William Gardner, et al. eds.; 1990); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Kentucky Ch. Rts. J. 16 (Summer 1999); Meghan M. Deerin, *The Teen Brain Theory*, Chicago Tribune, Aug. 12, 2001, at C1; Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 Child Development 538, 541-42 (1981); Thomas Grisso, *What We Know About Youth's Capacities, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 Stan. L. & Pol'y Rev. 153, 155 nn 107-108 (2003); Marty Beyer, *Immaturity, Culpability & Competency*

B. THE CHARACTERISTICS OF CHILD OFFENDERS RENDER JLWOP INAPPROPRIATE.

The Court in *Roper* and *Graham*, in declaring unconstitutional the death penalty for juveniles and JLWOP for non-homicide offenses, respectively, recognized that juveniles have lessened culpability and are thus less deserving of the most severe punishments for many reasons having no bearing on the juvenile's crime.[10] As compared to adults, juveniles have a lack of maturity, an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressures, have less control over their surroundings, and their characters are not as well formed. *Graham*, 130 S. Ct. at 2021; *Roper*, 543 U.S. at 569-70. Thus, there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567.

These characteristics of children mean that even a homicide committed by a juvenile is not

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in Juveniles: A Study of 17 Cases, 15 Summary of Criminal Justice 27 (2000).

[10] This Court recognized that "defendants who do not kill, intend to kill or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 130 S. Ct. at 2027 (citations omitted). However, the ABA asserts that every characteristic and difference between children and adults identified in *Roper* and *Graham*, and every other consideration supporting the holdings in those cases, support a ruling extending the holding of *Graham* to all juveniles regardless of whether they were convicted of homicide.

evidence of an irretrievably depraved character. As this Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Roper, 543 U.S. at 569-70 (citations omitted).

Likewise, this Court concluded that juveniles are more capable of change than adults, and their actions are less likely to be evidence of irretrievably depraved character. *Graham*, at 2026, citing *Roper*, 543 U.S. at 570. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation." *Graham*, 130 S. Ct. at 2032. Accordingly, juvenile offenders cannot be classified among the worst offenders. *Id.* at 2038, citing *Roper*, 573 U.S. at 569.

In considering a juvenile offender's personal responsibility and moral guilt, and the ensuing consequences for the sentencing of juveniles, this Court has concluded that children in the criminal justice system are more vulnerable to coercion, and more likely to falsely confess to crimes they did not commit than are adults. *J.D.B. v. North Carolina*,

131 S.Ct. 2394, 2403-2404 (2011).[11] The ABA maintains that, based on its study, research and the experience of its members, two other observations should be considered as well:

> First, juveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel, their limited appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy, and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).
>
> Second, "in eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders. Even when considering murder offenders sentenced to either life without parole or death sentences, in four of those years, children still were more likely than adults to receive one of those two most punitive sentences." Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, 2 (2005) *available at* http://www.amnesty.org/en/library

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11 Samuel Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period falsely confessed to crimes they did not commit).

/info/AMR51/162/2005/en (last visited Jan. 11, 2012).[12] Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. *Id.*

The foregoing observations underscore the need for safeguards, including the possibility of parole, as potential means to alleviate their harsh consequences and to give some opportunity for the exercise of some discretion regarding a juvenile before he or she dies in prison. *See* ABA Report with Recommendation #101D, supra note 7, at ¶6 ("judges should consider the individual characteristics of the youth during sentencing").

Many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults and the relevant statutes only permitted the adult sentences of either death or life without the possibility of parole.[13] As *Roper* eliminated the

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[12] "On its face, this data suggests that states have often been more punitive towards children who commit murder than adults. At the very least, it suggests age has not been much of a mitigating factor in the sentencing of youth convicted of murder." Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* at 33. These statistics are even more troubling because in the period from 1980 to 2008, just 11.1% of homicide offenders were age 17 and younger. Alexia Cooper and Erica L. Smith, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* (Nov. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (last visited Jan. 11, 2012). The ABA questions whether the homicides these children were involved in warranted harsher punishment than the 89% committed by adults.

[13] *See* Ark. Code 5-10-101(c)(1) and Ala. Code 13A-5-39(1).

death sentence for juveniles, the trial judge had only one "option" – life without parole. Thus, these statutory schemes deprived these judges of any discretion whatsoever to consider the backgrounds and mental development of these children in the sentencing process, or any other mitigating factors associated with young offenders, and, the ABA asserts, should be deemed to be contrary to the Court's *Roper* and *Graham* decisions. This lack of discretion is exacerbated by the increasing frequency with which children since the 1970s have been transferred to or tried in the adult criminal justice system. Patrick Griffin et al., Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of state Transfer Laws and Reporting* 8-9 (Sept. 2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf (last visited Jan. 11, 2012).[14]

JLWOP is the second most severe penalty permitted by law – next to death. *Graham*, 130 S.Ct. at 2016 citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (J. Kennedy, J., concurring). Indeed, a

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[14] Transfer laws generally fall into three basic categories. First, waiver laws allow juvenile courts to waive jurisdiction on a case by case basis. Second, prosecutors are often vested with discretion, sometimes without formal standards, in deciding whether a prosecution should be brought in juvenile or criminal court. Third, statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile offenders, thus bypassing the juvenile system altogether. *Id.* at 2. Statutory and prosecutorial discretion laws proliferated from the 1970s to 2000, and have changed little since then. *Id.* at 8-9.

sentence of JLWOP "share[s] some characteristics with death sentences...the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, at 2027, citing *Naovarath v. State*, 105 Nev. 525, 526 (1989) A JLWOP sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the child], he will remain in prison for the rest of his days.'" *Id.*

The ABA submits that the research, experiences of its members, and informed consideration that provided the basis for the IJA/ABA *Juvenile Justice Standards* and the ABA's policies, as well as behavioral research and studies, reinforce the fact that the transient characteristics that make juveniles less morally culpable and more likely to mature and reform, along with the severe nature of the sentence – death in prison – leads only to a conclusion that a JLWOP sentence should be categorically unconstitutional, even when the juvenile is convicted of homicide.[15]

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[15] Lawrence Steinberg, *A Behavioral Scientist Looks At The Science Of Adolescent Brain Development*, 72 Brain and Cognition 160, 162 (2010) ("From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving."); Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, NeuroImage, Dec. 8, 2011, at 8 [Epub ahead of print] ("The plentiful data that consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young

This Court has distinguished between the legal rights, protections and restrictions afforded to or imposed on children as compared to adults in drawing the line at the age of 18. *J.D.B.*, 131 S. Ct. at 2403-04; *Graham*, 130 S. Ct. at 2030; *Roper*, 543 U.S. at 574. The ABA submits that the same distinction should be made here, in declaring JLWOP unconstitutional for all defendants who committed crimes as juveniles.

C. NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

This Court recognized in *Roper* and *Graham* that transient characteristics of youth mean that none of the standard penological justifications of sentencing – retribution, deterrence, incapacitation or rehabilitation – were served by death sentences for juveniles or JLWOP for juveniles convicted of non-homicide crimes. *Roper*, 543 U.S. 551; *Graham*, 130 S. Ct. 2011. The ABA maintains that the principles recognized in *Roper* and *Graham* apply with equal force to JLWOP sentences for children convicted of homicide.

This Court recognized that the reduced moral culpability of juvenile offenders means that "the case for retribution is not as strong with a minor as with an adult." *Graham*, 130 S.Ct. at 2028, citing *Roper*, 543 U.S. at 571; *see also Roper* at 571. ("Retribution is not proportional if the law's most severe penalty is imposed on one whose

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age of criminal responsibility and harsh sentences for adolescents.").

culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.")

Likewise, "[d]eterrence does not . . . justify the sentence [because] the same characteristics that render juveniles less culpable than adults suggest . . that juveniles will be less susceptible to deterrence." *Graham*, 130 S. Ct. at 2028-9. A juvenile's lack of maturity and propensity for "impetuous and ill-considered actions and decisions" render them "less likely to take a possible punishment into consideration when making decisions." *Id.*; *see also, Roper*, 543 U.S. at 571 ("the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.") (citing *Harmelin*, 501 U.S. at 998-99 (1991) (Kennedy, J., concurring)).[16]

The ABA respectfully asserts that this Court's conclusion – that JLWOP for crimes other than homicide is not justified without the dubious finding that a child is "incorrigible" and not capable

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[16] Studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. *See, e.g.*, MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 3: Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

of reform, *Graham*, 130 S. Ct. at 2029 – applies with equal force to juveniles convicted of homicides. Likewise, while this Court recognized that the penological goal of incapacitation is served when a juvenile may be a threat to society, the Court also observed that because "the signature qualities of youth are transient," *Roper*, 543 U.S. at 570 (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993)), the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation, is not justified. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects . . . transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption"). The ABA asserts that the analysis should be no different for juveniles convicted of homicide.

Finally, the Court's conclusion that a sentence of JLWOP for crimes other than homicide cannot be justified by the goal of rehabilitation, *Graham*, 130 S.Ct. at 2029-30, applies with equal force to juveniles convicted of homicide. As stated by Justice Marshall in his dissent in *Harmelin*, 501 U.S. at 1028, a sentence of life imprisonment without the possibility of parole "does not even purport to serve a rehabilitative function...." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." *Ewing v. California*, 538 U.S. 11, 25 (2003); *Harmelin*, 501 U.S at 999 (Kennedy, J., concurring in part and concurring in judgment). As stated in *Coker v. Georgia*, 433 U.S.

584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

D. NEITHER PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY ALLOWING THE CHANCE FOR PAROLE.

Public safety would not be compromised by giving the right merely to be considered for parole to those who were children when they committed homicide. Indeed, public safety has not been compromised by giving 14 parole hearings to Sirhan Sirhan[17] and 11 parole hearings to Charles Manson (with another scheduled for 2012)[18], both adults when they committed murder. "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 130 S. Ct. at 2030. However, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juveniles convicted of nonhomicide crimes] never will be fit to reenter society." *Id.* The ABA asserts that the same

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[17] *Parole Denied for Sirhan Sirhan*, CDCR Today, March 2, 2011, http://cdcrtoday.blogspot.com/2011/03/parole-denied-for-sirhan-sirhan.html (last visited Jan. 11, 2012)

[18] *Parole Denied for Charles Manson*, CDCR Today, May 23, 2007, http://cdcrtoday.blogspot.com/2007/05/parole-denied-for-charles-manson.html (last visited Jan. 11, 2012).

analysis should be applied to juveniles convicted of homicide.

The parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions.[19] Thus, neither the public safety nor the objectives of the penal system would be compromised by allowing juvenile offenders the chance to be considered for parole.

Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[20] Parole boards consider many factors in making parole recommendations, including the seriousness of the offense, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability

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[19] *See e.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); *PA Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"); Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole Revocation Proceedings*, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior . . . under the threat of delaying or forfeiting early release from custody").

[20] *See, e.g.*, Ky. Rev. Stat. Ann. § 532.030 (2008) (25 years for capital offense); Mich. Comp. Laws § 791.234 (2009) (10 years before parole consideration for first degree murder or life sentence).

of parole plans, including how the inmate would live and support himself if released.[21] Some states have imposed more stringent approval requirements for certain offenders.[22] Most inmates eligible for parole consideration are not, in fact, granted parole.[23] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[24] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms

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[21] *See, e.g.*, Cal. Penal Code § 3041(a) (2005); Cal. Code Regs, tit. 15 § 2281 (2009); Cal. Code Regs tit.15 § 2402 (2009).

[22] *See, e.g.*, Michigan Dept. of Corrections, *The Parole Consideration Process*, http://www.michigan.gov/corrections/0,4551,7-119-1384-22909--,00.html (last visited Jan. 11, 2012) (requiring majority of all ten parole board members, rather than just the three member panel, must support parole for Michigan prisoners serving life sentences.)

[23] *See* Thomas P. Bonczar, Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Characteristics of State Parole Supervising Agencies, 2006*, (Rev. Mar. 16, 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cspsa06.pdf (last visited Jan. 11, 2012) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[24] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter. Others sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 Mass. Code Regs. 301.01 (2009).

of parole as an additional check to ensure that public safety is not compromised.[25]

States also impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[26] Once released, parolees are subject to any number of restrictions and conditions.

Finally, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[27] A state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.[28]

The ABA is not asserting that all juveniles serving JLWOP sentences for homicide will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity because, as children, they were given the second most severe penalty permitted by law.

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[25] *See, e.g.*, California Dept. of Corrections, *Life Parole Process*, http://www.cdcr.ca.gov/parole/ (follow link to "Lifer Parole Process") (last visited Jan. 11, 2012).

[26] *See, e.g.*, 37 Tex. Admin. Code § 145.2 (2009).

[27] *See generally*, Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[28] *See* Alaska Admin. Code tit. 22, §20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole).

Graham, 130 S. Ct. at 2016, citing *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

E. INTERNATIONAL AUTHORITIES DEMONSTRATE OVERWHELMING OPPOSITION TO JLWOP.

This Court has "treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S.Ct. at 2034.

A recent Amnesty International Report confirms that "[i]n the face of a virtual universal legal and moral consensus that [JLWOP] should never be used for children, the USA is the only country in the world imposing this sentence." Amnesty Int'l; *This is Where I'm Going to Die: Children Facing Life Imprisonment Without the Possibility of Release in the USA* at 1 (March 2011) (emphasis added).[29] Further, an array of international bodies oppose JLWOP.[30]

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[29] *See also Graham*, 130 S. Ct. at 2033, citing, *inter alia*, Amnesty Int'l., Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 106, n. 322 (2005) (only the United States and Israel impose JLWOP for homicides, but noting that the Israeli parole procedure was unclear).

[30] *See e.g.* United Nations Convention on the Rights of the Child, , Sept. 2, 1990, 1577 U.N.T.S. 3, Art. 37(a) [hereinafter "CRC"]; *id.* at Art. 40.1 (supporting "the desirability of

As this Court held, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper*, 543 U.S. at 578.

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promoting the child's reintegration and the child's assuming a constructive role in society."); Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* at 95 (identifying the United States and Somalia as the two countries that have not ratified the CRC, although both have signed it); *Hussain v. United Kingdom*, 22 EHRR 1, ¶ 53 (1996) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov, 4, 1950, CETS No. 5, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Jan. 11, 2012) (citing European Court of Human Rights' declaration that JLWOP is illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Human Rights Watch, *World Report* 107 (2005), *available at* http://www.hrw.org/legacy/wr2k5/wr2005.pdf (last visited Jan. 11, 2012) (reporting the Commission on Human Rights' April 2004 resolution urging states to abolish JLWOP); Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison*, 42 U.S.F. L. Rev. 983, 989 (2008) (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)) (reporting 185-1 U.N. General Assembly vote, with the United States the lone dissenter, calling upon nations to abolish the juvenile death penalty and JLWOP); Committee on Elimination of Racial Discrimination, Concluding Observations of the United States, ¶21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008) (reporting the U.N. Committee on the Elimination of Racial Discrimination determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence).

CONCLUSION

For the reasons stated above, *amicus curiae* the American Bar Association requests that the judgments below be reversed.

Respectfully submitted,

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January 17, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 10-9646, 10-9647

Supreme Court, U.S.
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In the
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

(Additional Caption on the Reverse)

On Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ of Certiorari to the
Supreme Court of Arkansas

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a homicide offense.

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INTERESTS OF AMICI CURIAE*

The American Medical Association. The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. Founded in 1847, the objects of the AMA are to promote the science and art of medicine and the betterment of public health.

The American Academy of Child and Adolescent Psychiatry. Founded in 1953, the American Academy of Child and Adolescent Psychiatry (AACAP) is comprised of over 7,500 child and adolescent psychiatrists and other interested physicians. Consistent with the focus of the juvenile court system on rehabilitation rather than retribution and multiple international treaties, including the UN Convention of Rights of the Child, the AACAP has adopted a policy statement strongly opposing the imposition of a sentence of life without

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* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the possibility of parole for crimes committed as juveniles. AACAP Policy Statement, June 2009, *available at* http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders.

Each of the above-referenced *amici* is committed to the advancement of science. While not taking a formal position on whether sentencing a juvenile to a term of imprisonment of life without the possibility of parole violates the protections provided by the Eighth Amendment of the U.S. Constitution, *amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to this issue.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures all over the world have presumed it for decades or more. And scientific evidence has continued to shed more light on how and why adolescent behavior differs from adult behavior.

The differences in behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, and are less capable of controlling their impulses making them susceptible to acting in a reflexive rather than a

planned voluntary manner. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the neurobiological underpinnings for why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit greater neural reactivity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions. Together, these studies indicate that the adolescent period poses vulnerabilities to risk taking behavior but, importantly, that this is a temporary stage.

While science cannot gauge moral culpability, scientists can shed light on some of the measurable attributes that the law has long treated as highly relevant to culpability and the appropriateness of punishment. This brief focuses on what science can tell us about the neurological, physiological, psychological, emotional, and behavioral development of adolescents from the perspective of researchers and medical professionals.

ARGUMENT

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS.

Although adolescents[1] can, and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a group, value risks and rewards differently from adults, which, coupled with limitations in controlling their impulses and recognizing and regulating emotional responses, makes them vulnerable to impulsive acts. *See* Point A, *infra*.

Moreover, recent advances in brain-imaging technology confirm that the very regions of the brain that are associated with voluntary behavior control and regulation of emotional response and impulsivity are structurally immature during adolescence. Studies have also revealed that these structural immaturities are consistent with age-related differences in both brain function and behavior. *See* Point B, *infra*.

These findings have led to an "explosion of scientific papers and popular articles" about the

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[1] There is a continuum of differences in brain maturation and cognitive abilities between the youngest and oldest of adolescents. All of the scientific conclusions recounted in this brief, however, are applicable to adolescents as a class—ranging from ages 12 to 17.

immaturities of the adolescent brain and how these immaturities explain the risky and impulsive behavior exhibited by teens.[2]

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior.

Numerous studies of adolescent behavior over the last two decades confirm the stereotype that adolescents, as a group, are prone to making impulsive or reactive judgments. "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."[3] Sensation-seeking peaks during adolescence across cultures and species, and is believed to be an adaptive and normal part of development that promotes learning and independence.[4]

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[2] David Dobbs, *Beautiful Brains*, 220:4 NAT'L GEOGRAPHIC 36, 48 (Oct. 2011).

[3] Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n. 1 (2000); *see also* Lawrence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774 (2008); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008); *see generally* Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149 (2006); Luciana Hooper et al., *Adolescents' Performance on the Iowa Gambling Task: Implications for the Development of Decision-Making and Ventromedial Prefrontal Cortex*, 40:6 DEVELOPMENTAL PSYCHOL. 1148 (2004).

[4] Beatriz Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, *in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz and Diego Cosmelli eds.,

Nevertheless, sensation-seeking behavior can result in actions that compromise survival (referred to as "risk-taking" behaviors) and involve sub-optimal decision-making. Risk-taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[5] The difference between adolescent and adult behavior, however, is not a function of adolescents' inability to distinguish right from wrong or in their intellectual abilities *per se*, but rather from psychosocial limitations in their ability to consistently and reliably control their behavior.[6]

Specifically, adolescents are less able, on average, than adults to self-regulate, or "cognitively" control, their behavior.[7] Cognitive control refers to the

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Springer Berlin Heidelberg 2009) (explaining that "these behaviors may be necessary to develop the social skills needed to gain independence in adulthood").

[5] Spear (2000), *supra* note 3, at 421; *see also* Casey (2008), *supra* note 3, at 65 ("[R]isk-taking appears to increase during adolescence relative to childhood and adulthood....")

[6] Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY 66, 67 (N. Bell & R. Bell eds., 1993).

[7] *See* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); *see also* R. K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents:*

ability to voluntarily exert goal-directed behavior while controlling compelling but goal-inappropriate responses.[8] Scientists have identified various interrelated immaturities in adolescents' self-regulatory abilities that contribute to their limitation in controlling their impulses and their greater tendency to engage in risky or reckless behavior. To name just a few, adolescents (1) tend to be more strongly motivated by the possibility of reward than adults; (2) have greater difficulty controlling their impulses; and (3) have greater difficulty recognizing and regulating emotional responses. We take a closer look at each of these factors below.

Reward Sensitivity. One of the main reasons adolescents are more likely to engage in risky behavior than adults is that adolescents tend to experience heightened levels of sensitivity to rewards, especially to immediate rewards.[9]

Insights from Anatomical Magnetic Resonance Imaging, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006); Luna (2009), *supra* note 4, at 249, 51; *see also* Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 40-41 (2009) [hereinafter Steinberg, *Future Orientation*] ("[C]hanges in impulse control and planning are mediated by a 'cognitive control' network . . . which matures more gradually and over a longer period of time, into early adulthood.").

[8] *See* Luna (2009), *supra* note 4, at 251.

[9] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter Steinberg, *Adolescent Development*]; *see also* C.F. Geier, et al., *Immaturities in Reward Processing and Its Influence on Inhibitory Control in Adolescence*, 20:7 CEREBRAL CORTEX 1613, 1624-26 (2010).

Placing a higher value on the potential reward leads to lower risk-reward ratios for adolescents, relative to adults, and thus a higher likelihood of engaging in the risky behavior.[10] In other words, adolescent behavioral research suggests that adolescents take more risks because they overvalue the potential reward, not because they are less able to appreciate the risks, as was once believed.[11] "[A]dolescents' greater involvement in risk taking, compared to adults', does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk."[12] Rather, it appears that adolescents and adults perceive *risks* similarly[13], but they evaluate potential *rewards* differently, especially when the risky behavior is weighed against the cost.[14]

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[10] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 57-58.

[11] *Id.* at 58.

[12] Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46:1 DEVELOPMENTAL PSYCHOL. 193, 194 (2010); *see also* Steinberg, *Adolescent Development*, *supra* note 9, at 57.

[13] Valerie Reyna & Charles Brainerd, *Dual Processes in Decision Making and Developmental Neuroscience: A Fuzzy-Trace Model*, 31 DEVELOPMENTAL REV. 180, 193 (2011).

[14] *See* Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?* 27 NEUROSCI. AND BIOBEHAV. REVS 3, 3-18 (2003); Fulton Crews, Jun He & Clyde Hodge, *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007); Spear (2000), *supra* note 3; Cauffman & Shulman, *supra* note 12, at 206; Steinberg

Furthermore, studies have shown that adolescents are more likely to take risks when they are in the presence of peers. "[O]ne of the hallmarks of adolescent risk taking is that it is much more likely than that of adults to occur in the presence of peers, as evidenced in studies of reckless driving, substance abuse, and crime."[15] More recent studies have also shown that this increased risk taking in the presence of peers is associated with greater neural activity in the areas of the brain associated with reward processing.[16] In fact, adolescents appear to place unique reward value on the presence of peers. With adolescents, "awareness of peers selectively amplifies activity in the [] brain's incentive processing system, which in turn influences subsequent decisions about risk."[17] Adults, on the other hand, "showed no differences in the

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(2008), *supra* note 3, at 1776 (linking lack of impulse control to sensation seeking behaviors).

[15] Albert Chein, et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14:2 DEVELOPMENTAL SCI. F1, F1 (2011) (internal citations omitted); Linda Patia Spear, *Rewards, Aversions and Affect in Adolescence: Emerging Convergences Across Laboratory Animal and Human Data*, 1 DEVELOPMENTAL COGNITIVE NEUROSCI. 390, 400 (2011).

[16] *See* Chein, *supra* note 15, at F7. These areas include the ventral striatum and orbitofrontal cortex. *Id.* at F1, F7 ("Specifically, relative to adults, adolescents demonstrated significantly greater activation of VS and OFC as they rendered decisions about risk, but only when they were aware that friends were watching them.").

[17] *Id.* at F8.

activation of these regions as a function of social context."[18]

Impulse Control. "A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."[19] Impulse control means allowing a goal-directed response to override a more compelling/reflexive, yet goal-inappropriate response.[20] The ability to control one's impulsive reactions to an event or problem is necessary to achieve adult levels of problem solving ability, logical reasoning, and the consistent exercise of good judgment.[21]

Adolescents have observable limitations in their ability to control their impulses. The relative inability of adolescents to control impulsive behavior is well-documented by studies on developmental changes in impulsivity and self-management over the course of adolescence.[22] "A number of classic developmental studies have shown that this ability develops throughout

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[18] *Id.* at F7.

[19] *See* Casey (2008), *supra* note 3, at 64.

[20] *See* Luna, *supra* note 4, at 251.

[21] *See id.*

[22] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 58; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007); Steinberg (2008), *supra* note 3, at 1772-74.

childhood and adolescence."[23] Capacity for self-direction has been shown to increase gradually throughout adolescence and into young adulthood.[24] Likewise, impulsivity tends to decline linearly from childhood to adulthood.[25] These findings indicate that adolescents have not yet attained adult levels of impulse control. In other words, adolescents are less able than adults to consistently reflect before they act.

Emotional Regulation. All individuals regulate their emotional responses to events. They increase or decrease their emotional reactions to stimuli in accordance with their behavioral goals.[26] The ability to regulate one's emotions efficiently is crucial for mental and physical health as well as for appropriate social interactions, and impairment of this capability is associated with affective disorders and a variety of other maladaptive psychological conditions.[27] This ability, however, continues to develop through adolescence into adulthood.[28] As a result,

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[23] *See* Casey (2008), *supra* note 3, at 64.

[24] *See* Steinberg, *Future Orientation*, *supra* note 7, at 28-29, 38-40.

[25] Steinberg (2008), *supra* note 3, at 1776; *see* Steinberg, *Adolescent Development*, *supra* note 9, at 57.

[26] *See* Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007); Kelly Anne Barnes et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32:3 DEVELOPMENTAL NEUROPSYCHOL. 787 (2007).

[27] *Id.* at 776.

[28] *See* Casey (2008), *supra* note 3, at 65.

similar to their ability to control impulses, adolescents have less ability to regulate their emotional responses to stimuli than adults.[29]

This relative limitation is important for understanding adolescents' ability to voluntarily control their behavior. Indeed, many situations, particularly those involving social interactions, arouse adolescents' emotional system and impact their ability to make informed decisions about their actions. Peer pressure, for example, can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and result in actions taken without full consideration or appreciation of the consequences.[30]

Each of these attributes continues to develop throughout adolescence and early adulthood, and is critical to the ability to effectively and consistently control one's behavior.[31] The developmental immaturities that adolescents

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[29] Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004); *see also, e.g.*, Todd A. Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63:10 BIOLOGICAL PSYCHIATRY 927 (2008) (adolescents show exaggerated responses in subcortical brain regions involved in emotional behaviors, which is associated with risk taking and heightened emotional responses to empty threats).

[30] *See* Steinberg (2007), *supra* note 22, at 1536-38 (explaining that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18").

[31] *See* Casey (2008), *supra* note 3, at 68.

exhibit with respect to each of these attributes compound to make them particularly prone to engage in risky and sensation-seeking behavior.

Researchers have also found that these limitations are especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, cognition, and voluntary behavior control in teenagers is particularly complex — and different from adults. Stress affects the ability to effectively regulate behavior as well as the ability to weigh costs and benefits and override impulses with rational thought.[32] Adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of their already skewed cost-benefit analysis.[33]

Emotion, like stress, also plays an important role in the ability to voluntarily control behavior, influencing decision-making and risk-taking behavior.[34] Because of their greater stress,

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[32] *See* Spear (2000), *supra* note 3, at 423; Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 22 (1992).

[33] *See* Spear (2000), *supra* note 3, at 423; Furby, *supra* note 32, at 22.

[34] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished*

greater influx of gonadal hormones, and their relative inability to consistently regulate their emotional responses, adolescents are more emotionally volatile than adults — and children, for that matter.[35] As a result, adolescents tend to experience emotional states that are more extreme and more variable than those experienced by adults.[36]

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents, as a group, cannot be expected to behave or make decisions in the same way as adults.

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior.

Modern brain research technologies have developed a body of data from the late 1990s to the present that provides a compelling picture of the inner workings of the adolescent brain.[37]

Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

[35] *See* Spear (2000), *supra* note 3, at 429.

[36] *See id.*; Cauffman (2000), *supra* note 6, at 743-45, 756-57, 59.

[37] *See* Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?* 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 20-21, 138 (2d ed. 2002).

Indeed, brain imaging data provides convergent evidence for the ways in which adolescents are still immature.[38] Developmental neuroscience has now gathered extensive evidence that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain.

This insight emerges from sophisticated and non-invasive brain imaging techniques performed by high-resolution structural and functional magnetic resonance imaging ("MRI") methods.[39] These imaging techniques are a quantum leap beyond previous methods for assessing brain development. Before the rise of neuroimaging, the understanding of brain development was gleaned

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[38] *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

[39] "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the Earth's. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989); *see also* Yurgelun-Todd, *supra* note 7, at 251-52 (explaining that "structural MRI and functional MRI (fMRI), have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of neurobiological changes and functional abilities associated with the brain.")

largely from post-mortem examinations.[40] Modern imaging techniques, however, have begun to shed light on how a live brain operates, and how a particular brain develops over time.[41]

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but have also provided new evidence that has changed the way scientists understand the development of the human brain as it progresses from childhood through adolescence and into adulthood.[42] "[B]rain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them."[43]

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[40] *See* Gazzaniga, *supra* note 37, at 63.

[41] *See generally* Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001).

[42] *See* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999); *see also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861 (1999).

[43] Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCI. 309 (2003); *see also* Gogtay, *supra* note 38, at 8177.

In this regard, two complementary observations have been especially revealing. First, the parts of the brain that work together to support the control of behavior, including the prefrontal cortex (which comprises roughly the front third of the human brain), continue to mature even through late adolescence.[44] Second, in making behavioral choices, adolescents rely more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior.

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated with Enhanced Abilities of Executive Behavior Control.

When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, a crucial part of the brain is the prefrontal cortex.[45] The prefrontal cortex is a core region that through its ability to integrate information across the brain supports

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[44] *See* Casey (2008), *supra* note 3, at 68.

[45] Sowell (1999), *supra* note 42, at 860; *see* Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12:1 DEVELOPMENTAL SCI. 55, 56 (2009) (explaining that "[n]europsychological and neuroimaging studies have shown that prefrontal cortex is strongly implicated in relational reasoning."); *see also* Gazzaniga, *supra* note 37, at 75; Rosso, *supra* note 29, at 360-61 (finding a correlation between frontal lobe development in adolescents, response inhibition and social anxiety levels); *see generally*, Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002).

planning of voluntary goal-directed responses and can exert control over more impulsive brain systems. As such, it is associated with a variety of cognitive abilities,[46] including those associated with voluntary behavior control and inhibition[47] such as risk assessment,[48] evaluation of reward and punishment,[49] and impulse control.[50] More generally, other functions associated with the prefrontal cortex include decision-making,[51] the

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[46] *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

[47] *See* R. Dias et al., *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence from "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997); Durston, *supra* note 37, at 1016; *see also* Yurgelun-Todd, *supra* note 7, at 253.

[48] *See* Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

[49] *See* J. O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999).

[50] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198-99 (2000).

[51] *See* Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008) (finding that important changes in the prefrontal cortex during adolescence lead to the development of logical reasoning abilities); *see also* Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCI. 428 (1998).

ability to judge and evaluate future consequences,[52] recognizing deception,[53] responses to positive and negative feedback,[54] working memory,[55] and making moral judgments.[56]

The brain's frontal lobes are still structurally immature well into late adolescence,[57] and the prefrontal cortex is "one of the last brain regions to mature."[58] This, in turn, means that "response inhibition," emotional regulation, planning and

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[52] *See* Bechara (2000), *supra* note 50.

[53] *See* D. D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).

[54] *See* R. Elliott et al., *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997).

[55] *See* Luna, *supra* note 4, at 264.

[56] *See* Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001); Steve W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032 (1999).

[57] *See* Gogtay, *supra* note 38, at 8174 (subjects of study aged 4 to 21 years); Giedd (1999), *supra* note 42, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 42, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); *see also* Sowell (2001), *supra* note 41, at 8826 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 43, at 309 (subjects of study aged 7 to 87 years).

[58] Casey (2000), *supra* note 46, at 243; *see also* Gogtay, *supra* note 38, at 8175.

organization . . . continue to develop between adolescence and young adulthood."[59]

The adolescent brain, in particular the frontal lobes and specifically the prefrontal cortex, is immature in at least two distinct ways that directly affect an adolescent's ability to cognitively control behavior. First, the gray matter where neuronal brain cells reside continues to mature, supporting complex neural processing needed for generating cognitive plans. Second, the integrity of white matter neuronal connections, which supports the fast connectivity needed to executively control impulsive responses, is still improving. Maturation of processes in the gray and white matter of the brain support the complex information processing that underlies executive voluntary control of behavior, which underlies decreased risk taking in adulthood. When fully mature, the ability to effectively process complex information and quickly affect behavior supports the adult's ability to make better-informed executive decisions.[60]

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[59] Sowell (1999), *supra* note 42, at 860; *see also* Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, *in* PSYCHIATRY 145, 151-52 (Allan Tasman ed., 2d ed. 2003).

This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and sub-cortical structures." *Id.* at 152.

[60] *See* Steven Petersen et al., *Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5:5 PLoS COMPUTATIONAL BIOLOGY 1, 8 (2009) (increased connectivity

Pruning. The gray matter of the brain is where brain cell "neurons" reside and includes the top layer of the brain and also the nuclei within the brain.[61] As the brain matures, gray matter *thins*[62] through processes called synaptic pruning, which is the programmed elimination of unused and cumbersome neuronal connections believed to support the ability for the brain to adapt to its environment. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of excess connections leads to greater efficiency and strengthening of the ability for complex information processing that support consistent exercise of good judgment.[63] Maturational improvements in the gray matter continue to take

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"promote[s] interactions between brain regions . . . allowing for a more effective 'solution' to any particular set of processing demands").

[61] *See* Gazzaniga, *supra* note 37, at 64-65; *see* Eric R. Kandel et al., PRINCIPLES OF NEURAL SCIENCE 9 (James H. Schwartz & Thomas M. Jessel, eds., McGraw-Hill 2000).

[62] *See* Durston, *supra* note 37, at 1014; Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48:5 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 465, 469 (2009); Gogtay, *supra* note 38, at 8174 (10 year study of gray matter loss showed continued gray matter loss until adulthood).

[63] *See* Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) (subjects of study aged 10 to 22 years); Casey, *supra* note 46, at 241 ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses . . ."); *see also* Daniel J. Siegel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 13-14 (Guilford Press 1999).

place through adolescence and into adulthood.[64] Thus, changes in gray matter, including pruning, enhance the ability to process complex information quickly allowing the brain to make executive plans supporting voluntary control of behavior.

Scientists have known about pruning for decades,[65] but modern brain imaging technology has provided important insights into the process.[66] Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.[67] Gray matter volumes

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[64] *See* Gogtay, *supra* note 38, at 8175.

[65] *See generally* Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195 (1979).

[66] *See, e.g.*, Sowell (2002), *supra* note 41, at 4.

[67] *See* McGivern, *supra* note 63, at 85; *see also* David N. Kennedy et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002).

> Studies showed . . . nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

peak during the ages from 10-20 years,[68] and the prefrontal cortex is one of the places where gray matter increases — before adolescence — and then gets pruned over time, beyond adolescence.[69] The prefrontal cortex is also one of the last regions where pruning is complete and this region continues to thin past adolescence.[70] This means that one of the last areas of the brain to reach full maturity, as measured by pruning, is the region most closely associated with risk assessment, impulse control, emotional regulation, decision-making, and planning — in other words, the ability to reliably and voluntarily control behavior.[71]

Myelination. Another important measure of brain maturity is myelination.[72] Myelination is

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Giedd (1999), *supra* note 42, at 861.

[68] *See* Giedd (1999), *supra* note 42, at 861; McGivern, *supra* note 63, at 85; Yurgelun-Todd, *supra* note 7, at 252, 55.

[69] *See* Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 339 (2008).

[70] A study by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that "the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence." Gogtay, *supra* note 38, at 8175.

[71] *See id.* at 8177 (explaining that "[l]ater to mature were areas involved in executive function"); *see also* Michael C. Stevens et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RESEARCH 12 (2007).

[72] *See* Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 144 (Oxford Univ. Press, 2001);

the process by which the brain's axonal connections become progressively insulated with a fatty white matter called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry information across long distances, and insulates the pathway, speeding the neural signal along the pathway.[73] "The presence of myelin makes communication between different parts of the brain faster and more reliable."[74] Myelination of "white matter"[75] continues through adolescence and into adulthood.[76]

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see also Sowell (2001), *supra* note 41, at 8819; Sowell (2003), *supra* note 43, at 311; Yurgelun-Todd, *supra* note 7, at 253.

[73] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004) (explaining that "the physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed."); Gazzaniga, *supra* note 36, at 31, 48-49.

[74] Goldberg, *supra* note 72, at 144.

[75] White matter is the tissue that composes the pathways between brain regions and that permits communication and interaction within the brain and between the brain and the body. *See* Gazzaniga, *supra* note 37, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. *See* Tomas Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999).

[76] M. R. Asato et al., *White Matter Development in Adolescence: A DTI Study*, 20:9 CEREBRAL CORTEX 2122, 2125 (2010) ("In agreement with other studies, we found evidence for continuing maturation of white matter throughout distributed brain

The integrity of the white matter, including myelination, matures at different rates across the brain.[77] Brain imaging data, supported by data gathered through the original histological (autopsy) techniques,[78] provides credible evidence that the connections from the prefrontal cortex are still developing well into adolescence and beyond, and are among the last pathways of the brain to mature.[79] In other words, maturation of prefrontal connectivity associated with voluntary behavior control (*i.e.*, risk assessment, impulse control, and emotional regulation) is not complete until late adolescence or beyond. Myelination also increases the efficiency of information processing and supports the integration of the widely

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regions from childhood into adulthood.") (internal citations omitted); *see* Nagy, Westerberg & Klingberg, *supra* note 73, *at* 1231-32; Durston, *supra* note 37, at 1014; Sowell (1999), *supra* note 42, at 860; Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

[77] *See* Sowell (2003), *supra* note 43, at 311; Sowell (2002), *supra* note 41, at 4; Towbin & Schowalter, *supra* note 59, at 151.

[78] *See* Paus, *supra* note 75, at 1908.

[79] *See* Gogtay, *supra* note 38 *at* 8177 (noting that different parts of the brain undergo myelination and pruning at different rates, and finding that the higher-order cortices mature later than lower-order cortices."); *see also* Sowell (1999), *supra* note 42, at 859; K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCI. & BIOBEHAV. REVS. 13 (2000) (subjects of study aged 12 to 19 and 22 to 40 years).

distributed circuitry needed for complex behavior.[80] These structural changes are believed to underlie the functional integration (discussed below) of frontal regions with the rest of the brain.[81] The functional improvement of the connections between the various regions of the brain is believed to result from myelination that occurs during adolescence and is necessary for improved abilities of reliable self-control and better decision-making.[82] Efficient connectivity is needed for cognitive regions to interact with regions processing emotion, rewards, and social information in a timely and effective manner in order to control responses for optimal decision making. For example, recent research on the neural underpinnings of resistance to peer influence in adolescence indicates that improvements in this capacity may be linked to the development of greater connectivity between brain regions, and likely facilitates the better coordination of affect and cognition.[83] More generally, however, the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation.[84]

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[80] *See* Luna (2009), *supra* note 4, at 257.

[81] *See id.; see also* Giedd (2009), *supra* note 62, at 467.

[82] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 56; Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296, 296-309 (2004); Damien A. Fair et al., *Development of Distinct Control Networks Through Segregation and Integration*, 104 PROC. NAT'L ACAD. SCI. U.S. 13507 (2007).

[83] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 56.

[84] *See* Nagy, Westerberg & Klingberg, *supra* note 73, at 1231-32.

Top-Down Connectivity. Recent studies have shown that "development of top-down effective connectivity from cognitive control regions is critical in supporting active inhibitory control."[85] Top-down connectivity refers to the ability for executive regions, such as in the prefrontal cortex, to exert executive control on response regions.[86] fMRI has shown that the strength and number of top down functional connections continues to increase into adulthood. In addition, the organization of functional brain connections forming networks continues to optimize into adulthood.[87] These results are supported by studies measuring the integrity of structural white matter pathways, which show protracted development of the connections between the prefrontal cortex and subcortical regions of the brain areas that support cognitive control.[88] The protracted development of top-down connectivity therefore "may reflect a period of particular vulnerability to both the peak in risk-taking behavior during adolescence and the emergence and exacerbation of psychopathology, which is associated

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[85] Kai Hwang et al., *Strengthening of Top-Down Frontal Cognitive Control Networks Underlying the Development of Inhibitory Control: A Functional Magnetic Resonance Imaging Effective Connectivity Study*, 30:46 J. NEUROSCI. 15535, 15543 (2010).

[86] *Id.* at 15542.

[87] *Id.*; Nico Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCIENCE 1358, 1360-61 (2010) (brain continues to mature until 22 years of age, with region of brain most highly correlated to brain maturity was pre-frontal cortex).

[88] Asato, *supra* note 76 at 2128; Petersen, *supra* note 60, at 8.

with abnormalities in reward processing and cognitive control."[89]

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated with the Ability to Voluntarily Control Behavior.

The brain is a complex network of interrelated parts. Each part is associated with different functions and works in conjunction with other parts to form systems. In general, the two neurobiological systems that inform our understanding of adolescent behavior, as discussed above in Point A, are (1) the motivational system, which includes the limbic and paralimbic regions of the brain; and (2) the cognitive control system, which is primarily comprised of the prefrontal cortex and its connections to the rest of the brain.[90] The differences between adolescent and adult behavior correlate with their respective and disparate reliance on each of these systems and their related brain structures.[91]

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[89] Asato, *supra* note 76, at 2128; *see* Spear (2011), *supra* note 15, at 391 (top-down control gradually gains a "competitive edge" over "'bottom-up' systems that express exaggerated reactivity to motivational stimuli").

[90] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 54.

[91] Stephanie Burnett et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE

The structural immaturities of the adolescent brain discussed above represent only one dimension of the immaturity of the adolescent brain. Developmental neuroimaging studies demonstrate that the regions of the brain associated with voluntary behavior control mature structurally at the same time as specific changes in how the brain functions.[92] These findings reveal that adolescents and adults exhibit different patterns of brain activity during decision-making tasks and provide insight into the neural underpinnings of the risky, impulsive, and sensation-seeking behavior of adolescents.[93]

Studies show that the motivational system, which underlies risky and reward-based behavior, develops earlier than the cognitive control system, which regulates such behavior. Furthermore, during adolescence, the motivational system

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NEUROSCI. 173 (2009); S. J. Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007).

[92] Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023, 1024 (2006); *see also* Liston C. Watts et al., *Frontostriatal Microstructure Predicts Individual Differences in Cognitive Control*, 16:4 CEREBRAL CORTEX 553 (2006); B.J. Casey et al., *Contribution of Frontostriatal Fiber Tracts to Cognitive Control in Parent–Child Dyads with ADHD*, 164:11 AM. J. PSYCHIATRY 1729 (2007).

[93] Krain, *supra* note 92; *see also* Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26:25 J. NEUROSCI. 6885 (2006); *see* Hare, *supra* note 29.

continues to develop more quickly than the cognitive control system.[94] The result is that adolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.

The earlier development of the motivational system is evident in a number of areas of the brain. Among these are the amygdala and the nucleus accumbens which, in conjunction with specific neurochemical imbalances in the adolescent brain (see below), contribute to the relative dominance of the adolescent motivational system.

Amygdala. The amygdala is associated with aggressive and impulsive behavior.[95] The

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[94] *See* Steinberg, Adolescent Development, *supra* note 9, at 54; *see also* Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 199 (2009).

[95] *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCI. 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002); Gazzaniga, *supra* note 37, at 553-72; K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Goldberg, *supra* note 72, at 31; Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter et al., *Response and Habituation of the*

amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation."[96] It dictates instinctive gut reactions, including fight or flight responses.[97] The amygdala is also a key component of circuitry involved in assessing salience, or the importance of environmental stimuli to survival, and is generally associated with processing emotional responses to a perceived danger.[98]

The prefrontal cortex — the primary region associated with self-regulation and the cognitive control system — modulates function in the amygdala[99] to which it is strongly connected.[100] A

Human Amygdala During Visual Processing of Facial Expression, 17 NEURON 875 (1996); Steinberg, *Future Orientation*, *supra* note 7, at 40.

[96] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 95, at 336.

[97] *See* Goldberg, *supra* note 76, at 31; Phan, *supra* note 95, at 336.

[98] *See* Giedd (2008), *supra* note 69, at 338.

[99] *See* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCI. 165RC (2001); Ahmad Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

still-maturing prefrontal cortex exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature prefrontal cortex.[101]

Nucleus Accumbens. The nucleus accumbens, a brain region rich in dopamine, is associated with reward processing. Its primary function is to process responses to a potential reward.[102] Studies show that when making decisions, "relative to children and adults, adolescents show exaggerated activation of the accumbens, in concert with less mature recruitment of top-down prefrontal control."[103] This exaggerated activity is consistent with the tendency of adolescents to overvalue rewards in risk-reward assessment and provides a

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[100] Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 303 (1996).

[101] *See* Neir Eshel et al., *Neural Substrates of Choice in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007) (reporting prefrontal brain areas associated with higher-order cognition, emotional regulation, reward values, and behavior control are some of the last to mature and that this lag in maturation may explain why adolescents demonstrate poor decision-making); *see also* Gargi Talukder, *Decision-Making Is Still a Work in Progress for Teenagers*, Report dated July 2000 at http://www.brainconnection.com; *see also* Spear (2000), *supra* note 3, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Ralph Adolphs et al., *Fear and the Human Amygdala*, 15 J. NEUROSCI. 5879, 5889 (1995).

[102] Galvan, *supra* note 93, at 6890.

[103] *See* Casey, *supra* note 3, at 69.

neurobiological basis for the "increased impulsive and risky behaviors observed during [adolescence]."[104]

The nucleus accumbens, which is found in the ventral striatum, is a "critical node" in the reward related neurocircuitry of the brain, contributing to directing behavior toward appropriate goals by consolidating contextual and goal directed information from other areas of the brain.[105] Developmental studies have shown hyperactivity in the ventral striatum during anticipation of rewards in adolescents, as compared to adults.[106] In parallel with increased reward reactivity in the ventral striatum, these studies have found increased engagement of the regions that support the behavior that leads to the reward. Increased reactivity to rewards paired with increased engagement of response regions can lead to an impulsive reaction in the presence of rewards in adolescence.[107] Such increased reactivity, coupled with other aspects of the developing brain, is

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[104] *See id.* at 69-70.

[105] Spear (2011), *supra* note 15, at 392; *see* Chein, *supra* note 15, at F1 (the ventral striatum is part of the "incentive processing system in the brain").

[106] *See* Geier, *supra* note 9, at 1625; Aarthi Padmanabhan et al., *Developmental Changes in Brain Function Underlying the Influence of Reward Processing on Inhibitory Control*, 1 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 517, 526 (2011), Spear (2011); *supra* note 15, at 394 (adolescents have been reported by a number of groups to show heightened activation of the ventral striatum during *receipt* of rewards relative to younger and/or older individuals").

[107] Geier, *supra* note 9, at 1626; Padmanabhan, *supra* note 106, at 523.

thought to potentially contribute to the high rate of risk taking in adolescence.[108]

Dopamine and Serotonin. Dopamine is a neurotransmitter that underlies pleasure and motivation.[109] Around the time of puberty, adolescents experience "a rapid and dramatic increase in dopaminergic activity within the motivational system."[110] Because dopamine plays a critical role in the brain's reward circuitry this increase in activity is likely to promote reward-seeking behavior.[111] At the same time, adolescents have correspondingly lower levels of serotonin, a neurotransmitter known to support inhibitory control.[112] This imbalance between lower levels of serotonin and higher levels of dopamine

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[108] Padmanabhan, *supra* note 106, at 527; Chein, *supra* note 15, at F1 ("Many research groups . . . have posited that adolescents' relatively greater propensity toward risky behavior" is based in part on the "*incentive processing* system involving the ventral striatum") (emphasis in original).

[109] *See* Andersen, *supra* note 14, at 3-18; Crews, He & Hodge, *supra* note 14, at 189-99; Spear (2000), *supra* note 3, at 417-63.

[110] Steinberg, *Adolescent Development*, *supra* note 9, at 54.

[111] *Id.* at 258; *see* Luna, *supra* note 4, at 258. Moreover, "[t]here is evidence that changes in the density and distribution of receptors for dopamine . . . within regions critical to incentive processing take place around the time of puberty, and that these changes coincide with a dramatic elevation in the salience of peer interactions." Chein *supra* note 15, at F8.

[112] *See* Luna, *supra* note 4, at 258; R. Andrew Chambers, Jane R. Taylor & Marc N. Potenza, *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041 (2003).

during adolescence is believed to underlie risky and impulsive decision making by adolescents.

In addition to motivation, dopamine also plays a crucial role in reinforcement learning. Thus, the adolescent period does not only include heightened motivation but also a greater capacity for learning[113] having implications for enhanced amenability for rehabilitation in the adolescent period compared to adulthood.

In sum, adolescent behavior is characterized by a hyperactive reward-driven system (involving the nucleus accumbens and increased dopamine), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex and decreased serotonin).[114] As a result, adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment. In other words, the adolescent brain is biologically biased to engage in exploring new environments and experiences which can involve taking risks.

Adolescence is a time of great physiological and psychological development. It is also a time marked by impulsive, risky, and sensation-

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[113] Dustin Wahlstrom et al., *Neurobehavioral Evidence for Changes in Dopamine System Activity During Adolescence*, 34 NEUROSCIENCE BIOBEHAVIORAL REV. 631, 643 (2010).

[114] Monique Ernst et al., *Triadic Model of the Neurobiology of Motivated Behavior in Adolescence*, 36 PSYCHOL. MED. 299, 300-302 (2006).

seeking behavior. Scientific research has shed light on the biological mechanisms that help to explain this behavior. And each time this Court has examined the constitutional limitations of imposing severe penalties on juvenile offenders, the scientific research on the development of the adolescent brain has grown. This research establishes that "the brain systems that are crucial for exerting cognitive control over behavior and processing rewards are still immature during adolescence."[115] "These immaturities result in a system that is able to exert cognitive control, but in an inconsistent manner with limited flexibility and motivational control."[116] In other words, "the basic elements are established, but refinements are needed to support the necessary efficiency in circuit processing to establish reliable executive control."[117] As one researcher put it, the process of adolescent development is akin to "starting the engines without a skilled driver behind the wheel."[118]

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[115] *See* Luna, *supra* note 4, at 258; *see also* Ryan L. Muetzel et al., *The Development of Corpus Callosum Microstructure and Associations with Bimanual Task Performance in Healthy Adolescents*, 39:4 NEUROIMAGE 1918 (2008); Elizabeth A. Olson, *White Matter Integrity Predicts Delay Discounting Behavior in Adolescents: A Diffusion Tensor Imaging Study*, 21:7 J. COGNITIVE NEUROSCI. 1406 (2008); Elizabeth A. Olson, *Delay and Probability Discounting Behavior in Healthy Adolescents: Associations with Age, Personality Style, and Other Measures of Executive Function*, 43:7 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886 (2007).

[116] *See* Luna, *supra* note 4, at 258.

[117] *Id.*

[118] Steinberg, *Adolescent Development*, *supra* note 9, at 56.

CONCLUSION

While not formally supporting either party in these cases, the *amici* hope that the Court will consider the scientific evidence presented here in its deliberations about whether, in the present case, the Eighth Amendment (1) requires that these defendants be held to a different standard of culpability from that which applies to adults and (2) prohibits the imposition of a sentence of life without the possibility of parole on an adolescent offender.

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

EVAN MILLER, *Petitioner*,
v.
STATE OF ALABAMA, *Respondent*.

KUNTRELL JACKSON, *Petitioner*,
v.
RAY HOBBS, *Respondent*.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas

BRIEF OF THE AMERICAN PROBATION AND PAROLE ASSOCIATION, THE CHILDREN'S DEFENSE FUND, THE CHILD WELFARE LEAGUE OF AMERICA, THE COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, AND THE NATIONAL PARTNERSHIP FOR JUVENILE SERVICES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The organizations submitting this brief work with, and on behalf of, juveniles in a variety of settings, including inside and outside the criminal justice system. Based on this experience, *amici* know that the differences between juveniles and adults – including impulsiveness, susceptibility to negative influences, and the capacity for rehabilitation – are profound. While juvenile offenders must be accountable for their actions, they cannot be held to the same standards of blameworthiness and culpability as adults.[1]

The American Probation and Parole Association ("APPA") is an international organization, representing approximately 35,000 probation and parole professionals in juvenile and adult corrections. The APPA works to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The Children's Defense Fund ("CDF") is a non-profit child advocacy organization dedicated to ensuring a level playing field for all children and to championing policies and programs that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation.

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

CDF advocates nationwide on behalf of children to ensure that children are always a priority.

The Child Welfare League of America ("CWLA") is a coalition of hundreds of private and public agencies serving vulnerable children and families by advancing policies, best practices and collaborative strategies in support of every child growing up in a safe, loving, stable family. CWLA's focus is on children and youth who may have experienced abuse, neglect, family disruption, or a range of other factors that jeopardize their safety, permanence, or well-being.

The Council of Juvenile Correctional Administrators ("CJCA") represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The National Partnership for Juvenile Services ("NPJS") was formed in 2001 and is comprised of four partner organizations: the National Association of Juvenile Correction Agencies, the National Juvenile Detention Association, the Juvenile Justice Trainers Association, and the Council of Educators for At-Risk and Delinquent Youth. NPJS provides professional development and technical assistance in the field of juvenile justice and delinquency prevention – promoting best-practices and standards – to positively affect youth, families and communities

SUMMARY OF ARGUMENT

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), this Court held that sentencing juvenile offenders who did not commit homicide to life-without-parole ("LWOP") is disproportionate to the culpability of juvenile offenders and therefore constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In doing so, this Court affirmed the simple yet profound distinction that juveniles are different from adults. This insight remains fully applicable in the context of juvenile offenders who commit homicide. Juveniles – even those convicted of homicide – are different.

Amici agree with the legal arguments set forth in Petitioners' brief. For the benefit of this Court, and based on *amici*'s own experience, *amici* present empirical data supporting three important points. First, juveniles have lessened ability to understand the consequences of their conduct, diminishing their culpability and competence. Second, juveniles are vulnerable to outside influences and pressure, and ill equipped to control their immediate surroundings or escape negative influences. Third, far from being irretrievably depraved and lost to society, juveniles possess significant capacity for development and rehabilitation.

In addition, in each section, *amici* include facts about individual juveniles involved in homicide or attempted homicide illustrating these distinctive characteristics. With regard to each of these individuals, a system of life-without-parole for juveniles would have prevented the development of dedicated, committed, productive citizens, and foreclosed the possibility of genuine rehabilitation.

Juveniles who commit homicide are different from adults in the same fundamental ways that this Court has recognized in other contexts. As the Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, punishment must be proportionate to juvenile offenders' culpability. Accordingly, in light of the distinctive characteristics of juveniles, sentences of life without the possibility of parole for juveniles violate the prohibition on cruel and unusual punishment in the Eighth and Fourteenth Amendments.

ARGUMENT

The differences between adolescents and adults are stark. These differences, long recognized by this Court, are confirmed and detailed in an extensive body of research. First, juveniles' lack of maturity and development burdens them with an underdeveloped sense of responsibility – affecting both their own culpability and their ability to assist in their defense. Second, juveniles are vulnerable to negative influences and societal pressures; at the same time, while more vulnerable, juveniles cannot control their own environments or escape from these negative influences and pressures. Third, because juveniles are still maturing, their identities are not fully formed, and they have a remarkable capacity for change and rehabilitation.

I. JUVENILES' LACK OF MATURITY AND UNDERDEVELOPED SENSE OF RESPONSIBILITY DIMINISH THEIR CULPABILITY AND COMPETENCE

Juveniles lack maturity. This lack of maturity results in an underdeveloped sense of responsibility, affecting impulse control and predictive abilities. [2] These traits undermine juveniles' culpability for their criminal offenses and their ability to assist with issues related to their legal representation.

A. Juveniles Lack Maturity and Have an Underdeveloped Sense of Responsibility

Marked differences between adults and adolescents, including their capacities to exercise self-control and anticipate long-term impacts of their actions, prevent juveniles from effectively measuring the "cost-benefit analysis that attaches any weight to the possibility of" a LWOP sentence. [3] In fact,

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[2] *See* Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacology, Biochemistry & Behav. 212, 216 (2009) (noting adolescence is commonly characterized as the developmental period between childhood and adulthood from ages twelve to seventeen); *see also* B.J. Casey, Sara Getz & Adriana Galvan, *The Adolescent Brain*, 28 Dev. Rev. 62, 72 (2008) (defining adolescence as a transitional time marked by puberty).

[3] *See Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality) (suggesting offenders under age 16 do not consider effect of juvenile death sentences); *see also* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Res. Adolescence 211, 215 (2011); Johanna Cooper Jennings, *Juvenile Justice, Sullivan, and Graham: How The Supreme Court's Decision Will Change The Neuroscience Debate*, 2010 Duke L. & Tech. Rev. 006, 7 (2010) (discussing youthful offenders, who often act impulsively without *(cont'd)*

characteristics such as risk-taking, sensation-seeking, and impulsiveness are common in adolescent behavior.[4] Behaviors that seem likely to increase positive emotions tend to become more desirable, even if they carry risk. [5] These characteristics come together in a lack of maturity that leaves juveniles unable to consider fully the future impact of their actions.[6]

Adolescents have difficulty planning ahead and anticipating future consequences.[7] Indeed, because of juveniles' "lack of maturity and an underdeveloped sense of responsibility," they are

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considering the long-term consequences, being denied opportunity for societal reentry when they are sentenced to life without parole).

[4] Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 218 (2009); *see also* Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 J. Health Care L. & Pol'y 375, 382 (2011) (noting impulsivity and sensation seeking are psychosocial factors that can affect risk-taking); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764, 1764 (2008).

[5] *See* Albert & Steinberg, 21 J. Res. Adolescence at 217.

[6] Elizabeth Locker, *Grow Up Georgia . . . It's Time to Treat Our Children as Children*, 4 J. Marshall L.J. 85, 96 (2011) (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

[7] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 36-37 (2009).

susceptible to "impetuous and ill-considered actions and decisions."[8] Unable to understand the likely outcome of events arising from their actions, sentences of life without parole offer little to deter juveniles from their actions.[9]

B. Juveniles' Distinctive Characteristics Diminish Their Criminal Culpability

Juveniles' distinctive characteristics diminish their criminal culpability. Juveniles are predisposed to hasty, high-risk behavior often resulting in terrible consequences.[10] These characteristics leave juveniles "less responsible, more myopic, and less temperate than the average adult," shunning broader perspectives on their individual actions.[11] Juveniles are statistically overrepresented in nearly all calculations of risky behavior.[12] This overrepresentation includes serious crimes, with

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[8] *Johnson*, 509 U.S. at 367.

[9] *Thompson*, 487 U.S. at 836-38.

[10] *See* Locker, 4 J. Marshall L.J. at 95-96; *see also* Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 Persp. on Psychol. Sci. 59 (2006) (exploring psychological implications of developments in adolescent brain).

[11] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 745, 757 (2000).

[12] Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992), http://jeffreyarnett.com/articles/arnett1992recklessbehaviorinadolescence.pdf.

approximately thirty percent of American males committing a violent offense by the age of 18.[13]

For many, adolescence signals a period of harmful behavior that includes alcohol abuse, substance abuse, and reckless driving.[14] This behavior is accompanied by the adolescent belief in one's own invincibility – "the worst" being a result possible only for others.[15]

This type of juvenile anti-social behavior reaches its apex in the teenage years.[16] Juveniles' intellectual, social, and emotional maturity is "not as well-formed as that of an adult."[17] Recent research establishes that impulsiveness wanes steadily after

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[13] *See* U.S. Dep't of Health and Human Servs., Youth Violence: A Report of the Surgeon General (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter2/sec12.html#prevelance.

[14] Valeria F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 Psychol. Sci. Pub. Int. 1, 8 (2006); *see also* Michael Windle & Rebecca C. Windle, *Alcohol and Other Substance Use and Abuse, in Blackwell Handbook of Adolescence* 450-463 (2003) (reporting empirical studies on initiation and escalation of adolescent substance use).

[15] Kathleen M. Thies & John F. Travers, *Handbook of Human Development for Healthcare Professionals* 195 (2006).

[16] *See* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 No. 5 Am. Psychologist 469, 474-75 (2000), http://jeffreyarnett.com/articles/ARNETT_Emerging_Adulthood_theory.pdf.

[17] *Roper*, 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835); *see also Graham*, 130 S. Ct. at 2026.

its apex, with appreciable decline into the mid-twenties.[18]

For juveniles, this lack of maturity, both in their behavior and their lack of foresight, can be exacerbated by circumstances requiring decisions "in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations . . . [and] when behavioral inhibition is required for good outcomes." [19] Scientists have determined that adolescents, as a result of "hard wiring," experience an elevated impact of stress that creates a correspondingly intense drop in judgment during emotion or stressful events.[20] To the extent that juveniles are making decisions in emotionally charged or pressured situations, those decisions are affected by an inability to control risk-seeking impulses.[21] Even when cognizant of risks, juveniles discount them in favor of immediate perceived benefits and gratification.[22]

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[18] Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 Developmental Psychobiology 216 (2010).

[19] Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. Rev. 1055, 1110 (2010) (quoting Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Dev. Psych. 625, 625 (2005)).

[20] Casey et al., 28 Dev. Rev. at 64.

[21] Hamilton, 2010 B.Y.U. L. Rev. at 1110.

[22] Reyna & Farley, 7 Psychol. Sci. Pub. Int. at 1.

C. Juveniles' Distinctive Characteristics Present Severe Challenges for Their Own Legal Representation

The distinctive characteristics of juveniles also present difficulties for defendants and counsel in the representation of juveniles. The same features that differentiate juveniles from adults – a lack of maturity, an unformed sense of responsibility, and impetuousness – also affect juveniles in criminal proceedings.[23]

To be tried in criminal court, individuals must have the capacity to understand the proceedings, comprehend their own legal rights, and consult with and assist their counsel in their own defense.[24] With juveniles, at least one-third of fifteen and sixteen-year-olds do not have an accurate understanding of a "right."[25] Adolescents have more difficulty grasping the roles of different actors in the adversarial system, undermining their understanding of their proceedings and their ability to assist counsel.[26] To make informed decisions in support of their defense, adolescent defendants must be able to understand how abstract concepts in criminal proceedings will

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[23] *Graham*, 130 S. Ct. at 2032; *see also* Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 Rutgers L. Rev. 959 (2010) (presenting challenges counsel face in representing juveniles).

[24] *Godinez v. Moran*, 509 U.S. 389 (1993); *Dusky v. United States*, 362 U.S. 402 (1980).

[25] Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary, in The Changing Borders of Juvenile Justice* 379 (2000).

[26] *Id.*

affect them individually.[27] Juveniles' distinctive inability to assist in their own defense can lead to wrongful convictions and subsequent sentencings.[28]

In 1979, this Court explained that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."[29] As one juvenile sentenced to life-without-parole stated:

> "When I seen [my attorney] before the sentence it was in the bullpen behind the court room and he told me there that I'd be getting natural life, I asked him how long that was and he told me, I couldn't understand the whole thing and kept asking him when I'd be going home, but another inmate explained it all to me. . . . I didn't know anything about the law or that he was supposed to come and see me during trial."[30]

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[27] *Id.*

[28] Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, Gideon Project, OSI 2004, http://www.mindfully.org/Reform/2004/Prison-Exonerations-Gross19apr04.htm (study discussing finding that cases involving juvenile defendants were over-represented among cases ultimately overturned as a wrongful conviction).

[29] *Parnham v. J.R.*, 442 U.S. 584, 603 (1979).

[30] Deborah Labelle et al., *Second Chances: Life Without Parole in Michigan Prisons*, ACLU of Michigan, at 16 (2004) [hereinafter "Labelle et al., *Second Chances*"]; *see also* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 828-31 (2005) (discussing how immaturity-based *(cont'd)*

In *Graham*, this Court emphasized the difficulty that defendants' youth causes in the attorney-client relationship.[31] Juvenile defendants are unable to assist their counsel as capably as adult defendants due to their suspicion and distrust of authority as well as their unfamiliarity with the criminal justice system.[32]

The defining characteristics of juveniles – such as impetuousness and an inability to grasp future consequences – thus affect not only a juvenile's commission of the crime, but also that juvenile's participation in the judicial system.

D. The Lives of Scott Filippi and Roger Needham Illustrate Juveniles' Tragic Impulsiveness and the Possibility of Rehabilitation

Scott Filippi and Roger Needham both committed homicide as minors in impulsive reactions to situational pressures. Both have been successfully rehabilitated, and their lives as productive adults would be impossible in an inflexible system of life-

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impairments can affect juvenile offenders' ability to understand their charges and the nature of the proceedings, as well as assist their attorneys).

[31] *Graham*, 130 S. Ct. at 2032.

[32] *Id.*; *see also* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 272-73 (2005) (minors work less effectively than adults with counsel due to developing cognitive skills, focus on immediate consequences, and lack of understanding of the attorney-client relationship).

without-parole for juvenile offenders who commit a homicide.

Scott Filippi – As a sixteen-year-old, Scott Filippi fatally shot his mother – a woman who had not only allowed, but participated in, the physical and psychological abuse of her children for years.[33] Court records describe the children's abuse as so severe that Filippi's sister lost her hearing and sight.[34] Filippi himself "remember[ed] a lot of dark rooms . . . a lot of hitting . . . and a lot of crying. No lights, just smack! and locked into a dark room."[35] He was left beaten by his stepfather "bloody from my head to my knees," followed by his mother's glancing instruction to "take a shower and get cleaned up."[36]

In October 1986, after years of being beaten with two-by-fours and belts, and being punched, kicked, and thrown down stairs, Filippi reacted in the heat of passion to his mother's abuse:

> "All of a sudden, she just started going off on me, telling me she hated me and she didn't love me. . . . Just going off. I ran upstairs, I grabbed a 22. One of Bruce's. . . . I just wanted her to

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[33] The Children's Court Centennial Communications Project, *Second Chances - 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice*, at 73-78, http://www.cjcj.org/files/secondchances.pdf.

[34] *Id.*

[35] *Id.* at 73.

[36] *Id.* at 74.

> listen, just to stop yelling at me and listen."[37]

Filippi shot and killed his mother.

Filippi was sentenced to a long-term residential treatment facility where he received psychological treatment.[38] Despite his horrific crime, involving the commission of a homicide as a minor, Filippi has succeeded in rehabilitating himself.

Following his release, Filippi joined the United States Army.[39] He flourished, and eventually earned a position in the Presidential Honor Guard of President George H.W. Bush.[40] Currently a sales director at a southern California Mercedes-Benz dealership, Filippi is engaged to be married and plans to write a book about his experiences to benefit others.[41]

Filippi explains:

> "I, and others like me, [am] living proof that prevention and rehabilitation programs are the best tools for deterring crime. I know that after reading this, people may view me differently. But when I was 16 and facing a life sentence in adult prison, I swore that if I could help others to get the same consideration I had, I would

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[37] *Id.* at 76.

[38] *Id.* at 77.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 78.

> do it. I am grateful for the chance I was given to make a new start, and hope other young offenders get the same chance."[42]

Roger Needham – Like Filippi, Roger Needham acted impulsively and committed homicide as a juvenile.

At the age of 15, Needham brought a gun to his high school.[43] Provoked by repeated name-calling, Needham killed one student and wounded another while being heard to say, "I'm tired of being pushed around. Now I'm even."[44]

Needham was released from a juvenile facility after years of rehabilitative programming and treatment.[45] Following his release, Needham went on to graduate from the University of Michigan with highest distinction and an eventual Ph.D. in mathematics.[46] He later secured employment teaching at St. Louis University and at the City University of New York.[47]

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[42] *Id.*

[43] Labelle et al., *Second Chances* at 23.

[44] Susan Taylor Martin, *Murder at Locker 02-069*, St. Petersburg Times Online (Feb. 11, 2001) http://www.sptimes.com/News/021101/Floridian/Murder_at_Locker_02_0.shtml.

[45] *Id.*

[46] *Id.*

[47] *Id.*

The events that led to the incarceration of Scott Filippi and Roger Needham were abhorrent. More generally, the violent acts committed by some juveniles are unquestionably brutal and deeply disturbing. At the same time, such acts are inextricably linked to juveniles' inability to exercise self-control and to anticipate the long-term impacts of their actions. These acts often are rooted in juveniles' propensity for risk-taking and impulsiveness. They reflect juveniles' distinctive susceptibility to impetuous and ill-considered actions and decisions. The lives of Scott Filippi and Roger Needham illustrate that even minors who commit the most egregious crimes – homicide – can be rehabilitated when they enter adulthood.

II. JUVENILES ARE MORE SUSCEPTIBLE TO NEGATIVE INFLUENCES AND OUTSIDE PRESSURES THAN ADULTS

A. Research Shows That Juveniles Are More Vulnerable and Susceptible to Negative Influences and Pressures

Juveniles face far greater vulnerability and susceptibility to negative influences and outside pressures than adults. [48] These influences and pressures include peers, substances, and environment. Scientists have identified

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[48] *See* Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, J. of the Am. Acad. of Arts and Scis. at 44 (Summer 2010); *see also* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1101 (2003) ("adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences").

psychological and neurological differences between children and adults that confirm the heightened vulnerability and susceptibility of minors.[49]

Adolescent vulnerability is well documented. First, adolescents exhibit less robust levels of independent functioning than adults, primarily manifested in weak self-reliance and self-concept.[50] These lower levels of independent functioning increase adolescent vulnerabilities to peer pressure and outside factors.[51]

Second, research indicates that adolescents are disposed to succumb to the negative influence of their peers.[52] Peer influence affects adolescent

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[49] *See, e.g.*, Cauffman & Steinberg, 18 Behav. Sci. & L. at 742-43; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21(22) J. Neuroscience 8819, 8819 (2001); Steinberg & Scott, 58 Am. Psychologist at 1013; B.J. Casey et al., 28 Developmental Rev. at 62; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychol. 241 (2000); Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 Developmental Sci. 55 (2009); Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging Typically Developing Children and Adolescents*, 48 J. Am. Acad. Child & Adolescent Psychiatry 465 (2009); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861 (1999).

[50] Kathleen Kemp et al., *Characteristics of Developmental Immaturity: A Cross-Disciplinary Survey of Psychologists* (under review).

[51] *See* Steinberg & Scott, 58 Am. Psychologist at 1012.

[52] *See* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531 (2007) ("[T]here is little doubt that peers actually

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judgment both directly and indirectly.[53] Juveniles may make choices in response to direct peer pressure, with additional indirect pressure present in the desire for peer approval and related fear of rejection.[54] Importantly, "susceptibility to peer pressure" is greatest when anti-social behavior and delinquency are involved.[55] Adolescents thus have a tendency to choose an antisocial activity suggested by their peers rather than a more positive choice of their own.[56] Even with criminal activity, juveniles tend to commit crimes in groups far more than adults.[57] This phenomenon remains present even in the absence of direct pressure.[58]

This kind of pressure from the peer community can lead juveniles to join gangs and engage in violence. Data on juvenile delinquents are replete with references to gang peer groups and the

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influence each other and that the effects of peer influence are stronger during adolescence than in adulthood.").

[53] Steinberg & Scott, 58 Am. Psychologist at 1012.

[54] *Id.*

[55] *See* Steinberg & Monahan, 43 Developmental Psychol. at 1532.

[56] T. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 614 (1979).

[57] Peter Ash, *Adolescents in Adult Court: Does the Punishment Fit the Criminal?*, 34 J. Am. Acad. Psychiatry L. 145, 147 (2006).

[58] Gardner & Steinberg, 41 Developmental Psychol. at 629-30 (noting adolescents took twice as many risks on a driving task when peers were present than when they were alone, running yellow lights at the risk of being hit by an unseen car).

attendant expectations for criminal activity. In many cases, however, while this peer influence was a primary cause of crime and delinquency in minors, the gang influence did not remain a lasting presence in juveniles' post-adolescent lives.

Adolescents face particular vulnerability to drug abuse and addiction due to the developing state of their brains.[59] According to the U.S. Department of Education, drug abuse is a particular risk for juveniles because "[t]he critical areas in the brain used for making judgments and comprehending complex concepts like safety and freedom are not fully developed at age 15" and do not reach full development until individuals are in their twenties.[60] As a result, issues regarding drug abuse "occur during a period of dramatic changes" in the adolescent brain.[61]

At the same time, juveniles are more limited by their environments than adults, with little or no ability to decide where they live or attend school.[62] Many lack transportation, independent income, and

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[59] Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, The Challenge Vol. 14, No. 3 (U.S. Dep't of Educ., Office of Safe and Drug Free Schools, 2007), http://thechallenge.org/14_3_research.html/.

[60] *Id.*

[61] *See Interview with Nora Valkow, M.D., Director of the National Institute on Drug Abuse (NIDA)*, The Challenge, Vol. 14, No. 3 (U.S. Dep't of Educ., Office of Safe and Drug-Free Schools, 2007), http://thechallenge.org/14_3_interview.html/.

[62] *See Roper*, 543 U.S. at 553; *see also* Locker, 4 J. Marshall L.J. at 99.

a route of exit.[63] As the Court explained in *Roper*, juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[64]

The greater the number of risk factors faced by children in their environments – including living in dilapidated and violent neighborhoods; attending failing and deteriorating schools; or suffering violence and neglect at home – the greater the risk that children will be deprived of healthy adolescent development and cognitive growth.[65] Poverty alone is an important factor in an adolescent's development that is "harmful to the physical, socioemotional, and cognitive well-being of children."[66] Evidence suggests that the damage to

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[63] *See id.*

[64] *Roper*, 543 U.S. at 570; *see also* Gary W. Evans, *The Environment of Childhood Poverty*, 59 Am. Psychologist 77, 88 (2004) (noting children from low-income environments and other risk factors, are "more likely to rely on peers than adults" and are particularly vulnerable to aggressive peers).

[65] *See* Evans, 59 Am. Psychologist at 88; Brian J. Bigelow, *There's an Elephant in the Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents and Their Parents*, 23 Developmental Disabilities Bull. 177, 185 (2006); *see also* Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence: The Influence of Social and Family Risk Factors*, 64 Child Dev. 80, 80-97 (1993).

[66] Evans, 59 Am. Psychologist at 88; Bigelow, 23 Developmental Disabilities Bull. at 202 ("The deleterious effects of stressful levels of poverty on early child development are no longer subject to serious debate.").

brain growth and development from these toxic environmental factors begins at birth and "is often the most important variable in understanding children's learning disorders."[67]

B. The Life of Lawrence Wu Illustrates Juveniles' Vulnerability to Negative Influences and Pressures

Lawrence Wu was arrested for attempted murder as a juvenile as an outgrowth of the influence of his peers and environment. Wu emerged from this time in his life changed and ready to participate in, and contribute to, society. Sentences of life without the possibility of parole eliminate not only the hope that juveniles have for their futures, but also the contributions that juvenile offenders like Wu may some day make to their communities and society at large.

Lawrence Wu – Living in a single-parent home that Lawrence Wu describes as "lower middle class" and always "teetering on bankruptcy," Wu joined one of a half-dozen gangs at his high school.[68] According to Wu, doing so was considered a fast track to "coolness."[69] He explained: "They were universally feared by everyone, and I thought, this is wild and fun, and I started hanging out with these kids."[70]

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[67] Bigelow, 23 Developmental Disabilities Bull. at 177-78.

[68] *Second Chances - 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* at 14-18.

[69] *Id.* at 15.

[70] *Id.*

With continued delinquency and falling grades, Wu was kicked out of his house and dropped out of school.[71] He joined one of New York City's Asian gangs that ran gambling, prostitution, and enforcement syndicates from New York to Hong Kong.[72] As a 15-year-old gang member, Wu had been tasked with walking down the street in New York City or waiting in a movie theater armed with a gun and instructed to shoot any members of a rival Chinatown gang he encountered.[73] The rival gang targets of these "killing missions" never arrived where Wu was waiting.[74]

Wu eventually, however, was arrested as an accomplice in a brutal beating of an individual believed to be a rival gang member: "One of my friends had a lock, put his finger through the ring, and we walloped this guy with a 'fist of fury,' and basically bashed his head to a pulp."[75] Fortunately for Wu, this victim did not suffer long-term health consequences and the charges were dropped.[76]

Finally taking his cue that "this gangster stuff is getting old," Wu went from a juvenile record of arrest for attempted murder, fighting and other crimes relating to his involvement with Asian gangs, to completing his GED and college education.[77] Wu's

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[71] *Id.*

[72] *Id.* at 15-16.

[73] *Id.* at 16.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 17.

[77] *Id.*

successful transition from juvenile offender to contributing member of society culminated with his matriculation to law school and selection as editor-in-chief of the Columbia Law Review.[78] Wu now provides a powerful example of the effects external influences can have on a juvenile's actions. Today, as an adult, Wu counts his blessings:

> "I think it is definitely true that a system of second and third chances [is] very important. I know that from my own life. . . . I know a lot of people from that gang that I would want to see locked up. . . . They really are irredeemable. But it is hard to have a general rule of culpability when there are so many individual circumstances."[79]

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The vulnerability experienced by juveniles like Lawrence Wu, and his subsequent development into a valued, contributing member of society, refutes the notion that juveniles should be treated as society's worst offenders with no hope of rehabilitation.[80] Juveniles face greater vulnerability to negative influences and pressures than adults. The use of life-without-parole sentencing for juveniles is inconsistent with the fact that juveniles are different; it disregards the reality that juveniles' distinctive

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[78] *Id.* at 18.

[79] *Id.*

[80] *See Roper*, 543 U.S. at 570.

characteristics prevent their acts from being as "morally reprehensible as [those] of an adult."[81]

III. JUVENILES HAVE INCREASED LIKELIHOOD FOR REHABILITATION BECAUSE ADOLESCENT CHARACTER IS NOT WELL FORMED

A. Research Shows Juveniles Have Increased Likelihood for Rehabilitation

A sentence of life without the possibility of parole also removes opportunities for rehabilitation despite wide recognition that juveniles are candidates for rehabilitative success.[82] Despite misconceptions that violent juvenile offenders are irredeemable, juveniles have demonstrated capacity for rehabilitation. One researcher estimated that "chronic" juvenile offenders (*i.e.*, those with five or more arrests) account for merely six percent of the entire juvenile offender population. [83] More recently, a study followed more than 1,000 serious male adolescent offenders (*i.e.*, felony offenses with the exception of less serious property crimes, and misdemeanor weapons or sexual assault offenses) over the course of three years and revealed that only 8.7 percent of participants were found to be "persisters" such that

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[81] *Graham*, 130 S. Ct. at 2026 (quoting *Thompson*, 487 U.S. at 835).

[82] *See Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) ("it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life").

[83] Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, 6 Future of Child. 75, 77 (1996).

their offending behavior was constant throughout the 36-month period.[84]

Juvenile corrections programs also have demonstrated success in establishing that juveniles can be rehabilitated.[85] For example, the Missouri Department of Youth Services ("MDYS") has reduced recidivism in juveniles through targeted programming, including regional small-scale secure correction centers and an arrangement of community-based non-residential programs and group homes.[86] In 2008, MDYS reported that their population included 13 percent of the youth committed for the most serious felonies and 41 percent for other felonies.[87] MDYS' recidivism rate

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[84] Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychol. 453, 462 (2010).

[85] *See* Counsel of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youths to Adult Systems (Oct. 2, 2009), http://cjca.net/cjcaresources/20/CJCA-Waiver-Position-Paper.pdf; *see also* Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions* at 4 (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Feb. 2000), http://ncjrs.gov/pdffiles1/ojjdp/178900.pdf (finding participants in prison education programs are more likely to be employed and less likely to re-offend if and when released)

[86] Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, Juv. Just. Bull. at 8 (Office of Juvenile Justice & Delinquency Prevention, Aug. 2005).

[87] Missouri Division of Youth Services, *Annual Report: Fiscal Year 2008* [hereinafter "MDYS Annual Report"], at vi (2009).

was ten percent for 2008 and had been between seven to nine percent for the four years prior to 2008.[88] Other examples of rehabilitative programs shown to be effective, even with violent and aggressive youth, include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST).[89] All three have demonstrated significant results in reducing recidivism rates, even for serious violent offenders.[90]

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[88] *Id.* at 30 (recidivism rate based on the recommitment to MDYS after 24 months of release).

[89] *See* Greenwood, 6 Future of Child. at 75; *see also* Edward J. Loughran & Elizabeth Mengers, *CJCA Yearbook 2010: A National Perspective of Juvenile Corrections* (2010).

[90] *See* Charles M. Borduin et al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence*, 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with history of repeat felonies); Carol M. Schaeffer & Charles M. Borduin, *Long-term Follow-up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, 73 U. Consulting & Clinical Psychol. 445, 449-452 (2005) (finding that the benefits of MST often extend into adulthood); W. Jeff Hinton et al., *Juvenile Justice: A System Divided*, 18 Crim. Just. Pol'y Rev. 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial*, 12 J. Emotional & Behav. Disorders 2, 2-7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC).

B. The Life of Brandon Carnell Illustrates Juveniles' Capacity for Rehabilitation

The success of rehabilitating even the most troubling of juvenile offenders is embodied in the life of Brandon Carnell. As a juvenile, Carnell shot and killed his family. As a rehabilitated adult, Carnell is an example of the potential that can exist in even the most troubled juvenile.[91]

Brandon Carnell – At the age of fourteen, Brandon Carnell murdered his parents and younger sister.[92] Originally claiming that his family had been shot by two men, Carnell later confessed to the killings.[93] He complained that he felt picked on by other family members and objected to his family's discipline and "negative attitude" toward him.[94]

Following his conviction, Carnell was incarcerated and given rehabilitative programming and treatment. He eventually was released at age 19.[95] Fourteen years later, Carnell directs several children's outreach programs and volunteers at his

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[91] *See generally Graham*, 130 S. Ct. at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."); *Roper*, 543 U.S. at 1195-96 ("it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed").

[92] *Killer at 14 is Model Citizen 15 Years Later*, Ann Arbor News, State Section, June 23, 2003, at B6; *see also Boy Charged in Murders Felt Picked on by Parents*, The Argus-Press, June 24, 1988, at 8.

[93] *Id.*

[94] *Id.*

[95] Labelle et al., *Second Chances*, at 23.

church.[96] He has completed his education, married, started his own family, and is now a valued member of his community.[97]

Juvenile life-without-parole rejects all possibility of rehabilitation. As Carnell's life story demonstrates, even one convicted of first degree murder as a juvenile and sentenced to a juvenile facility is not necessarily irrevocably destined to a life of violence and crime.[98] Like the death penalty, the practical effect of a life-without-parole sentence is to extinguish any possibility for juvenile offenders to "attain a mature understanding of [their] own humanity."[99]

As Brandon Carnell's life illustrates, juveniles have a unique capacity for rehabilitation.

CONCLUSION

Life without parole represents an irrevocable forfeiture of a juvenile offender's life – a permanent loss to society. As one court observed in overturning

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[96] *Id.*

[97] *Id.*

[98] *Id.*; *see also* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 675 (1993).

[99] *See Roper*, 543 U.S. at 574; *see also Graham*, 130 S. Ct. at 2033 ("he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes"); *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) (LWOP, "like death, is a sentence different in quality and character from a sentence to a term of years subject to parole").

a juvenile life-without-parole sentence, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[100]

The massive amount of research – as well as individual examples of juveniles involved in homicide or attempted homicide who undergo dramatic changes – illustrate that youthful mistakes, even the most grievous and deplorable, are not necessarily markers of character so permanently flawed that an irrevocable sentence to die in prison may be constitutionally imposed.[101]

As this Court decided in *Roper* and *Graham*, punishment must be proportionate to the culpability of a juvenile offender. With the understanding of the fundamental differences between juveniles and adults, inflexibly sentencing juveniles to life in prison with no possibility of parole for criminal offenses – including homicides – is cruel and unusual.[102]

For the foregoing reasons, *amici* respectfully submit that sentences of life without the possibility of parole for juveniles are in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

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[100] *Naovarath v. State*, 779 P.2d 944, 944 (1989).

[101] *See* Locker, 4 J. Marshall L.J. at 96.

[102] *See Graham*, 130 S. Ct. at 2033; *Roper*, 543 U.S. at 561.

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AMICUS CURIAE BRIEF

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EVAN MILLER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,

v.

RAY HOBBS,
Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND THE ARKANSAS SUPREME COURT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 150,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of U.S. psychologists holding doctoral degrees from accredited universities.[2]

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of parole for offenses committed by individuals under 18 years of age.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters of consent are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Amici acknowledge the assistance of Elizabeth Cauffman, Ph.D., Thomas Grisso, Ph.D., Terrie Moffitt, Ph.D., Laurence Steinberg, Ph.D., and Jennifer Woolard, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer-review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court's understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization's members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with nearly 145,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Graham* v. *Florida*, 130 S. Ct. 2011 (2010), this Court held that the Eighth Amendment prohibited life sentences without the possibility of parole for juveniles convicted of non-homicide offenses. The special characteristics of juveniles that this Court identified in *Graham*—and that are supported by a large and growing body of research—apply equally to juveniles convicted of homicide offences.

In *Graham*, this Court reiterated the critical differences between juveniles and adults that it set out in *Roper* v. *Simmons*, 543 U.S. 551 (2005)—differences that do not absolve juveniles of responsibility for their crimes, but that do reduce their culpability and undermine any justification for definitively ending their free lives. The Court noted that juveniles lack adults' ca-

pacity for mature judgment; that they are more vulnerable to negative external influences; and that their characters are not yet fully formed. *Graham*, 130 S. Ct. at 2026-2027; *Roper*, 543 U.S. at 569-570, 573. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570. Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment." *Id.* And "[j]uveniles are more capable of change than are adults," meaning that "their actions are less likely to be evidence of 'irretrievably depraved character,'" even in the case of very serious crimes. *Graham*, 130 S. Ct. at 2026-2027; *see Roper*, 543 U.S. at 570. Accordingly, "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential"—with "no chance to leave prison before life's end"—because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham*, 130 S. Ct. at 2032.

As was true in *Graham*, "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles." 130 S. Ct. at 2026. Rather, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* In fact, an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions. Compared to adults, juveniles are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risky behaviors; and less

oriented to the future and thus less attentive to the consequences of their often-impulsive actions. Research also continues to demonstrate that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. *Roper*, 543 U.S. at 569. Thus, even after their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment and decision-making, especially in the social contexts in which criminal behavior is most likely to arise.

Moreover, because juveniles are still in the process of forming coherent identities, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself, *Roper*, 543 U.S. at 570, rather than an entrenched bad character. Research into adolescent development continues to confirm the law's intuition that "'incorrigibility is inconsistent with youth.'" *Graham*, 130 S. Ct. at 2029. And although some youthful offenders will develop into criminal adults, it remains essentially impossible "even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. As *Roper* recognized, that is true even of juvenile offenders who have committed the most serious crimes.

Recent neuroscience research suggests a possible physiological basis for these recognized developmental characteristics of adolescence. It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance. That anatomical and functional immaturity is con-

sonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity. During puberty, juveniles evince a rapid increase in reward- and sensation-seeking behavior that declines progressively throughout late adolescence and young adulthood. This effect is amplified by exposure to peers, and it corresponds with significant changes in certain elements of the brain's "incentive processing system"—especially the parts that process rewards and social cues. By contrast, the ability to resist emotional impulses and regulate behavior develops gradually throughout adolescence, and that behavioral development corresponds with gradual development of the brain structures and systems most involved in executive function and impulse control. The disjunction between these developmental processes—which is greatest in early and middle adolescence and narrows as individuals mature into young adulthood—is consistent with the familiar features of adolescence that this Court recognized in *Roper* and *Graham*.

In short, research continues to confirm and expand upon the fundamental insight underlying this Court's previous decisions: Juveniles' profound differences from adults undermine the possible penological justifications for punishing a juvenile offender with a sentence that "guarantees he will die in prison without any meaningful opportunity to obtain release." *Graham*, 130 S. Ct. at 2033. Nor does the scientific literature provide any reason to distinguish between homicide and non-homicide convictions in this regard. In either case, the signature qualities of adolescence reduce juveniles' culpability and increase their capacity for change. Condemning an immature, vulnerable, and not-yet-fully-formed adolescent to live every remaining day of his life in prison—whatever his crime—is thus a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Roper* and *Graham*, this Court concluded that "marked and well understood" developmental differences between juveniles and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform.[3] *Roper*, 543 U.S. at 572. Current research continues to reinforce that conclusion, confirming that the three developmental characteristics of juveniles that this Court has identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those differences are central to the calculus of culpability and the proportionality of punishments imposed on juvenile offenders.

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[3] We use the terms "juvenile" and "adolescent" interchangeably to refer to individuals aged 12 to 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from 16- and 17-year-olds. Nonetheless, because adolescents generally share certain developmental characteristics that mitigate their culpability, and because "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court's decisions have recognized age 18 as a relevant demarcation point. *Graham*, 130 S. Ct. at 2030; *see Roper*, 543 U.S. at 574. The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

A. Juveniles Are Less Capable Of Mature Judgment Than Adults

As this Court has recognized, adolescents have less capacity for mature judgment than adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569.

As this Court noted in *Roper*, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" 543 U.S. at 569. Indeed, such behavior is "virtually a normative characteristic of adolescent development."[4] Juveniles' risky behavior frequently includes criminal activity; in fact, "numerous rigorous self-report studies have ... documented that it is statistically aberrant to refrain from crime during adolescence."[5] Both violent crimes and less serious offenses "peak sharply" in adolescence and "drop precipi-

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[4] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992).

[5] Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-686 (1993). Moffitt posits that there are two groups of adolescent offenders who may engage in similar antisocial behavior: a majority whose offending is limited to adolescence, and a minority who will persist into adulthood.

tously in young adulthood."[6] This "age-crime curve" is "[o]ne of the most consistent findings across studies."[7]

Adolescents' striking tendency to engage in risky and even illegal behavior stems in part from their lesser capacity for mature judgment. Research has shown that adolescents' judgment and decision-making differ from adults' in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even older adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.[8]

1. Empirical research confirms that adolescents are less capable of self-regulation than adults and, accordingly, are less able to resist their social and emotional impulses. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of "temperance," which included "impulse control" and

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[6] *Id.* at 675 & fig. 1 (depicting age-crime curve with steep peak in late adolescence); Arnett, *supra* note 4, at 343; Terrie Moffitt, *Natural Histories of Delinquency*, in *Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 29 (Elmar Weitekamp & Hans-Jürgen Kerner eds., 1994).

[7] Rolf Loeber et al., *Violence and Serious Theft* 77 (2008); *see also* Moffitt, *supra* note 6, at 7; Kathryn Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 Developmental Psychol. 1654, 1654 (2009).

[8] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-56 (2008).

"suppression of aggression."[9] More recent studies confirm this result. In one example, researchers examined differences in impulsivity between ages 10 and 30, using both self-report and performance measures, and concluded that impulsivity declined throughout the relevant period, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood.[10] In short, "adults tend to make more adaptive decisions than adolescents," in part because "they have a more mature capacity to resist the pull of social and emotional influences and remain focused on long-term goals."[11]

As explained below, *infra* pp. 25-31, researchers have an increasingly well-developed understanding of aspects of the adolescent brain that may help explain this relative deficit in mature self-control. It is now well-established that the brain continues to develop throughout adolescence and young adulthood in precisely the areas and systems that are regarded as most

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[9] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

[10] Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Developmental Psychol. 1764, 1774-1776 (2008).

[11] Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Research on Adolescence 211, 220 (2011); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain*, 10 Developmental Sci. F8, F13 (2007) (finding, in study of individuals aged 7 to 29, that impulse control continues to develop throughout adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in impulsivity from ages 14-16 to 20-22).

involved in impulse control, planning, and self-regulation. But juveniles also lack experience navigating the changing social and environmental contexts, and regulating the new emotional pressures, of adolescence. *See Roper*, 543 U.S. at 569. "[T]he developing adolescent can only learn his or her way to fully developed control by experience," and that "process will probably not be completed until very late in the teen years."[12] Thus, "expecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[13]

2. Adolescents not only struggle to regulate their behavior in response to their emotional impulses, but also respond differently to perceptions of risk and reward. "In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults."[14] For example, one study comparing adolescent and adult decision-making found that, when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely

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[12] Franklin Zimring, *Penal Proportionality for the Young Offender*, in *Youth on Trial* 271, 280 (Thomas Grisso & Robert Schwartz eds., 2000).

[13] *Id.* at 282.

[14] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003); *see* Arnett, *supra* note 4, at 350-353 (summarizing evidence that adolescent recklessness relates to poor "probability reasoning"); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in *Adolescent Risk and Vulnerability* 15, 34-35 (Baruch Fischoff et al. eds., 2001).

than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[15] Similarly, a recent study that employed a gambling task to measure reward-seeking and risk-avoidance behavior in a group of more than 900 individuals aged 10 to 30 found that "adolescents and adults evince[d] significantly different patterns of approach [*i.e.*, reward-seeking] and avoidance [*i.e.*, risk-averse] behavior."[16] Whereas adolescents improved their performance over time by being drawn to the bets with the best rewards, adults improved by avoiding bets with the worst losses. The authors concluded that the "present study, as well as previous work, demonstrates that decision making ... improves throughout adolescence and into young adulthood but that this improvement may be due not to cognitive maturation but to changes in affective processing. Whereas adolescents may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both, even weighing costs more than rewards."[17]

Similarly, adolescents are particularly attuned to *immediate* rewards, and display much steeper "tempo-

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[15] Bonnie Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001). Even greater differences prevailed between adults and younger adolescents. *See id. at* 268.

[16] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 204 (2010).

[17] *Id.* at 204, 206.

ral discounting" than adults.[18] Juveniles are emotionally primed for spur-of-the-moment, reward- and sensation-seeking behavior without offsetting, adult sensitivities to corresponding risks and longer-term consequences. Indeed, studies have shown that perceptions of reward, not risk, are better predictors of adolescent antisocial behaviors.[19] This less mature weighing of risk and reward renders adolescents more likely to engage in criminal activity, as well as other kinds of risk-taking.[20]

3. Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions.[21] Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence.[22] The study of maturity of judgment discussed above found

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[18] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 39 (2009); Steinberg, *supra* note 8, at 58.

[19] Louk Peters et al., *A Review of Similarities Between Domain-Specific Determinants of Four Health Behaviors Among Adolescents*, 24 Health Educ. Research 198, 216 (2009).

[20] Arnett, *supra* note 4, at 344, 350-351 (relating skewed adolescent risk- and reward-perception to fact that 50% or more of adolescents report drunk driving, unprotected sex, illegal drug use, or some form of criminal activity).

[21] *Id.* at 351-352; Zimring, *supra* note 12, at 280.

[22] *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28-29 (1991); Steinberg et al., *supra* note 18, at 35-36.

that adolescents' future orientation is weaker than adults': Comparing over 1,000 subjects, it found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."[23] Similarly, studies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.[24]

The ability to resist and control emotional impulses, to gauge risks and benefits in an adult manner, and to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to make mature, fully considered decisions. Empirical research confirms that even older adolescents have not fully developed these abilities and hence lack an adult's capacity for mature judgment. "[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[25]

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[23] Cauffman & Steinberg, *supra* note 9, at 746, 748, 754 & tbl. 4.

[24] Nurmi, *supra* note 22, at 28-29; *see* Steinberg et al., *supra* note 18, at 35-36.

[25] Cauffman & Steinberg, *supra* note 9, at 741, 756, 758 (noting that the most dramatic increase in psychosocial maturity occurs between ages 16 and 19); *see* Halpern-Felsher & Cauffman, *supra* note 15, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence[.]").

It should be noted that multiple abilities contribute to mature judgment, and those abilities develop at different rates. Sound judgment requires both cognitive and psychosocial skills, but the former mature earlier than the latter. Studies of general cognitive capability show an increase from pre-adolescence until about age 16, when gains begin to plateau.[26] By contrast, social and emotional maturity continue to develop throughout adolescence. Thus, older adolescents (aged 16-17) often have logical reasoning skills that approximate those of adults, but nonetheless lack the adult capacities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment,[27] especially in emotionally charged settings.[28] Younger adolescents are thus doubly disadvantaged, because they typically lack not only those social and emotional skills but basic cognitive capabilities as well.[29]

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[26] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel Keating, *Cognitive and Brain Development*, in *Handbook of Adolescent Psychology* 45, 64 (Richard Lerner & Laurence Steinberg eds., 2d ed. 2004) (cognitive functions exhibit robust growth at earlier ages but approach a limit in the 14- to 16-year-old group).

[27] Cauffman & Steinberg, *supra* note 9, at 743-745; Halpern-Felsher & Cauffman, *supra* note 15, at 264-271; Steinberg, *supra* note 8, at 55-59.

[28] Albert & Steinberg, *supra* note 11, at 216-220.

[29] The dissent in *Roper* criticized the American Psychological Association for taking allegedly inconsistent positions regarding adolescent maturity with respect to severe criminal sanctions for

B. Juveniles Are More Vulnerable To Negative External Influences

As this Court has also recognized, "juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment, and their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[30] Difficult family and neighborhood conditions are major risk factors for juvenile crime, includ-

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juveniles (in *Roper*) and the competence of minor females to obtain abortions absent parental notification (in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990)). *See* 543 U.S. at 617-618 (Scalia, J., dissenting). These are different questions concerning distinct aspects of mature judgment. *Hodgson* addressed *competence* to make medical decisions that can be made in a relatively unhurried manner in consultation with medical professionals, and the Association's brief thus focused on adolescents' *cognitive* abilities, which approximate those of adults by mid-adolescence. The questions presented in *Roper*, *Graham*, and this case concern the degree of *culpability* and *reformability* of adolescents who commit criminal acts that often evince impulsivity and ill-considered choices resulting from *psychosocial* immaturity. *See* Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 Am. Psychologist 583, 592-593 (2009); Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 226-235 (1995).

[30] Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial*, *supra* note 12, at 47.

ing homicide.[31] Yet, precisely because of their legal minority, juveniles lack the freedom to remove themselves from those negative external influences. Put simply, juveniles lack the control over themselves and their lives that adults possess, mitigating their blameworthiness for remaining in destructive or "'criminogenic'" situations. *Roper*, 543 U.S. at 569.

Juveniles are also especially vulnerable to the negative influence of peer pressure. Research has shown that susceptibility to peer pressure to engage in antisocial behavior increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.[32] For instance, one major study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among

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[31] *Id.* at 47-48; *see* Rolf Loeber & David Farrington, *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood* 61 & tbl. 4.1 (2011) (noting high likelihood that homicide offenders came from broken family or bad neighborhood); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth on Trial*, *supra* note 12, at 372, 389-391.

[32] Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 848 (1986); Fagan, *supra* note 31, at 382-384 (discussing coercive effect of social context on adolescents).

young adults.[33] "[T]he presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions."[34]

This study was recently replicated using fMRI technology, allowing researchers to measure variations in the activation of different brain areas under different experimental conditions. Because of technological constraints, the "peer pressure" variable was limited to manipulating whether test subjects were observed by peers or not while performing the task. Strikingly, mere awareness that peers were watching encouraged risky behavior among juveniles, but not adults.[35] The neuroimaging also showed different activation in different brain areas across the experimental variables. Adults showed significantly greater activation in brain regions involved in executive functions and the regulation of impulses, whether or not they were being observed by peers. By contrast, adolescents showed significantly greater activation in brain areas associated with reward processing when they were told that their peers were watching than when they were not being observed.[36]

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[33] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 41 Developmental Psychol. 625, 626-634 (2006).

[34] *Id.* at 634; *see* Laurence Steinberg & Kathryn Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531, 1538 (2007) (same).

[35] Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain's Reward Circuitry*, 14 Developmental Sci. F1, F7 (2011).

[36] *Id.* at F5-F8.

Juveniles' lesser ability to resist peer influence affects their judgment both directly and indirectly. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[37]

Adolescents are thus more likely than adults to engage in antisocial behavior in order to conform to peer expectations or achieve respect and status among their peers.[38] Not surprisingly, juvenile crime is significantly correlated with exposure to delinquent peers,[39] and adolescents are "far more likely than adults to commit crimes in groups."[40] "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."[41] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."[42] "A

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[37] Scott & Steinberg, *supra* note 32, at 38-39; *see also* Moffitt, *supra* note 5, at 686; Zimring, *supra* note 12, at 280-281.

[38] *See* Moffitt, *supra* note 5, at 686.

[39] *See id.* at 687-688.

[40] Scott & Steinberg, *supra* note 32, at 39.

[41] Zimring, *supra* note 12, at 281; *see* Joan McCord & Kevin Conway, *Co-Offending and Patterns of Juvenile Crime* 5 (2005) (finding that "[c]o-offending violence increased throughout adolescence").

[42] Zimring, *supra* note 12, at 280.

necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer-pressure," a social skill that is not fully developed in adolescents.[43]

In short, as this Court has observed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles' developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they "have a greater claim than adults to be forgiven" for the criminal acts that result from such pressures. *Roper*, 543 U.S. at 570.

C. Juveniles Have A Greater Capacity For Change And Reform

Finally, as this Court has recognized, "the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570. Accordingly, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character.'" *Graham*, 130 S. Ct. at 2026. A defining aspect of adolescence is that character is not yet fully formed, and adolescents' signature qualities—including their susceptibility to peer influence and weaknesses in self-regulation—reflect their incomplete identity or "sense of self." Thus, what may be perceived as fixed personality traits in juveniles may in fact result from malleable factors such as present maturity level or social

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[43] *Id.* at 280-281.

context, rather than engrained or enduring aspects of personality or worldview. Research has shown that personality traits change significantly during the developmental transition from adolescence to adulthood,[44] and the process of identity-formation typically remains incomplete until at least the early twenties.[45] Juveniles are simply more likely than adults to change.

This Court recognized in *Roper* that because "juveniles still struggle to define their identity, ... it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." 543 U.S. at 570. And it reaffirmed in *Graham* that "'from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" 130 S. Ct. at 2026-2027.

In fact, juveniles do typically outgrow their antisocial behavior as the "'impetuousness and recklessness'" of youth subside in adulthood. *Roper*, 543 U.S. at 570. Adolescent criminal conduct frequently results from

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[44] *See* Brent Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course*, 132 Psychol. Bull. 1, 14-15 (2006).

[45] *E.g.*, Alan Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college."); Laurence Steinberg & Robert Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial*, *supra* note 12, at 9, 27 ("[M]ost identity development takes place during the late teens and early twenties."); Scott & Steinberg, *supra* note 32, at 52 ("[C]oherent integration of ... [identity] does not occur until late adolescence or early adulthood. ... [T]he final stages of this process often occur during the college years.").

experimentation with risky behavior and not from deep-seated moral deficiency reflective of "bad" character.[46] For most juveniles, therefore, antisocial behavior will "'cease with maturity as individual identity becomes settled.'" *Id.* at 570. Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood; "the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature."[47]

As this Court has previously observed, moreover, even experts have no reliable way to predict whether a particular juvenile offender will continue to commit crimes as an adult. *See Roper*, 543 U.S. at 573. The positive predictive power of juvenile psychopathy assessments, for instance, remains poor. One study found that only 16% of young adolescents who scored in the top quintile on a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24.[48] The authors concluded that "most individuals identified as psychopaths at age 13 will not receive such a diagnosis" as adults.[49] A recent study of 75 male juvenile offenders found that assessments of psychopathic characteris-

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[46] Moffitt, *supra* note 5, at 686, 690; *see also* Arnett, *supra* note 4, at 344, 366-367.

[47] Steinberg & Scott, *supra* note 14, at 1014-1015; *see also* Moffitt, *supra* note 5, at 685-686; Monahan et al., *supra* note 7, at 1654, 1655.

[48] Donald Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160 (2007).

[49] *Id.* at 162.

tics did not predict general or violent reconvictions over a 10-year follow-up period.[50] And another recent study showed no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality such as "cruelty to people and callous-unemotional behavior."[51]

To be sure, research has identified certain childhood risk factors, or "predictors," that show a statistically significant association with adult criminality. But such studies do not suggest that anyone could reliably determine, *ex ante*, whether particular juvenile offenders will reoffend. To the contrary, the same research makes clear that such predictions cannot be made with any accuracy. Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults. For example, a major longitudinal study of Pittsburgh inner-city boys successfully identified, *ex post*, childhood risk factors, including various forms of antisocial behavior and crime, that were correlated with future homicide convictions. But it also found that, even among the subgroup of boys with the greatest number of risk factors, only a small minority were eventually convicted of homicide: Using the authors' model to attempt to identify juveniles who would be future homicide offenders yielded a very high false positive rate of 87%.[52]

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[50] *See* John Edens & Melissa Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood*, 14 Assessment 57, 60 (2007).

[51] Loeber & Farrington, *supra* note 31, at 158.

[52] *Id.* at 75.

In fact, researchers have consistently concluded that the behavior of juveniles who will and will not continue as criminal offenders through adulthood is "often indistinguishable during adolescence."[53] In first distinguishing between adolescence-limited and persistent offenders, researchers recognized that they could not "effectively assign individual delinquent adolescents to meaningful subtypes on the basis of ... their antisocial behavior during adolescence."[54] And those who have dedicated their careers to identifying risk factors associated with persistent criminality continue to acknowledge that "[t]he results show very imperfect predictions of which offense trajectory individuals will follow over time," and to warn against the "danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions."[55]

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[53] Monahan et al., *supra* note 7, at 1655; *see also, e.g.*, John Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence*, 19 Behav. Sci. & L. 53, 59 (2001) (collecting evidence that psychopathy assessments may "tap construct-irrelevant variance associated with relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features"); Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004) (noting discontinuity and disappearance of mental disorders identified in adolescence).

[54] Moffitt, *supra* note 5, at 678.

[55] Loeber et al., *supra* note 7, at 333.

Moreover, it is just as difficult to predict future criminality among adolescents convicted of the most serious crimes.[56] A recent, major effort to identify risk factors for recidivism among serious adolescent offenders confirmed the "good news ... that even within a sample ... limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small," while acknowledging the "bad news" that the ability to predict future criminality remains "exceedingly limited."[57] Most strikingly, when the homicide study discussed above limited its effort to predict future homicide offenses to boys who had already committed an act of violence, it "did not significantly improve predictive accuracy."[58] In fact, the false-positive rate *increased* from 87% to 89%.[59]

In sum, juveniles are still developing their character and identity, and it is quite likely that a juvenile of-

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[56] *See id.* (distinguishing, throughout, between serious and less serious forms of violence and theft).

[57] Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychopathology 453, 468-470 (2010); *see also* Monahan et al., *supra* note 7 (finding that only 6% of serious juvenile offenders persisted in high levels of antisocial behavior into adulthood).

[58] Loeber & Farrington, *supra* note 31, at 88.

[59] *Id.* at 89; *see also* Alex Piquero et al., *Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective*, Aggression & Violent Behav. (forthcoming 2012) (concluding that "most youths who become violent do so in adolescence and their violent involvement is limited to the late teen/early 20s" and that "attempt[ing] to correctly predict the violent recidivist is virtually impossible").

fender will desist from crime in adulthood. *See Roper*, 543 U.S. at 570. Juvenile crime is likely to be the product of the "signature qualities of youth," *id.*; there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

D. Juveniles' Psychosocial Immaturity Is Consistent With Recent Research Regarding Adolescent Brain Development

Neuroscientists continue to accumulate evidence that the adolescent brain is not yet fully developed in critical respects. By now, "[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence," and "[a]lthough most of this work has appeared just in the last 10 years, there is already strong consensus among developmental neuroscientists about the nature" of these changes.[60] While research continues into the precise meaning and effect of the changes in the brain during adolescence, they are consistent with and suggest the possible physiological basis for adolescents' observed psychosocial immaturity.

The most noteworthy features of adolescent brain development relate to changes occurring within the brain's frontal lobes—in particular the prefrontal cortex—and in the connections between the prefrontal

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[60] Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychologist 739, 742 (2009).

cortex and other brain structures. These areas and interconnections are critical to "executive" functions such as planning, motivation, judgment, and decision-making, including the evaluation of future consequences, the weighing of risk and reward, the perception and control of emotions, and the processing and inhibition of impulses.[61] Four related changes in these brain systems during adolescence merit special attention.

First, early adolescence (especially the period immediately after puberty) coincides with major changes in the "incentive processing system" of the brain involving neurotransmitters like dopamine.[62] "[R]eward-related regions of the brain and their neurocircuitry undergo particularly marked developmental changes

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[61] *E.g.*, Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 24, 141 (2001); B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychol. 241, 244-246 (2000); Elizabeth Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999); Antonio Damasio & Steven Anderson, *The Frontal Lobes*, in *Clinical Neuropsychology* 404, 434-435 (Kenneth Heilman & Edward Valenstein eds., 4th ed. 2003) (one "hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests" of the individual).

[62] *E.g.*, Chein et al., *supra* note 35, at F2; Linda Spear, *The Behavioral Neuroscience of Adolescence* 149-150 (2009); Dustin Wahlstrom et al., *Developmental Changes In Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment*, 72 Brain & Cognition 146, 150-151 (2010); Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 Pharmacology Biochem. & Behav. 199, 206-208 (2009); Albert & Steinberg, *supra* note 11, at 217.

during adolescence."[63] These pubertal changes are seen in other species, and "have been linked to changes in reward-directed activity" among adolescents, especially the willingness to engage in risky and socially motivated behaviors.[64] The observed spike in risk-taking, reward-seeking, and peer-influenced behaviors among adolescents correlates with this normal aspect of adolescent brain development.

Second, during childhood and early adolescence the brain undergoes substantial synaptic "pruning"—the paring away of unused synapses—leading to more efficient neural connections.[65] During adolescence, this pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.[66]

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[63] Tamara Doremus-Fitzwater et al., *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 Brain & Cognition 114, 116 (2010); Steinberg, *supra* note 60, at 743.

[64] Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 Brain & Cognition 160, 161 (2010); Spear, *supra* note 62, at 18-19; Linda Van Leijenhorst et al., *What Motivates the Adolescent? Brain Regions Mediating Reward Sensitivity Across Adolescence*, 20 Cerebral Cortex 61, 67 (2010).

[65] Casey et al., *supra* note 61, at 242-243; Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8175 (2004); Spear, *supra* note 62, at 81-90; Peter Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

[66] *E.g.*, Nitin Gogtay & Paul Thompson, *Mapping Gray Matter Development*, 72 Brain & Cognition 6, 7 (2010); Neir Eshel et

Third, the adolescent brain undergoes substantial myelination, the process through which neural pathways are insulated with a white fatty tissue called myelin. That insulation "speeds ... neural signal transmission," making "communication between different parts of the brain faster and more reliable."[67] "[M]yelination is ongoing well into late adolescence and early adulthood."[68] And this "improved connectivity within the prefrontal cortex is important for higher order functions subserved by multiple prefrontal areas, including many aspects of executive function, such as response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information."[69]

Fourth, "well into late adolescence" there is "an increase in connections not only among cortical areas but between cortical and subcortical regions" that are "especially important for emotion regulation."[70] As the

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al., *Neural Substrates of Choice Selection in Adults and Adolescents*, 45 Neuropsychologia 1270, 1270-1271 (2007); Spear, *supra* note 62, at 87-90.

[67] Goldberg, *supra* note 61, at 144.

[68] Steinberg, *supra* note 60, at 743; *see* Rhoshel Lenroot et al., *Sexual Dimorphism of Brain Developmental Trajectories During Childhood and Adolescence*, 36 Neuroimage 1065, 1065 (2007).

[69] Steinberg, *supra* note 60, at 743; *see* Casey et al., *supra* note 61, at 245-246; Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8828 (2001).

[70] Steinberg, *supra* note 60, at 743; Spear, *supra* note 62, at 119-120, 125-126; Thomas Eluvathingal et al., *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in*

brain matures, that self-regulation is "facilitated by the increased connectivity between regions important in the processing of emotional and social information and regions important in cognitive control processes."[71] This developmental pattern is consistent with adults' superior ability to make mature judgments about risk and reward, and to exercise cognitive control over their emotional impulses, especially in circumstances that adolescents would react to as socially charged.[72]

In short, the brain systems that govern many aspects of social and emotional maturity, such as impulse control, risk avoidance, planning ahead, and coordination of emotion and cognition, continue to mature throughout adolescence.[73] Importantly, these changes occur at different times, with the rapid, pubertal changes in the brain's incentive and social processing systems outpacing the slower, steadier, and later-occurring changes in areas related to executive function

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Normally Developing Children and Adolescents, 17 Cerebral Cortex 2760, 2763-2764 (2007).

[71] Steinberg, *supra* note 60, at 743; Leah Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain & Cognition 124, 128-129 (2010) (noting importance of white-matter development and the "functional network [in] mediat[ing] the ability to exert control in the face of emotion").

[72] Chein et al., *supra* note 35, at F7-F8; Steinberg, *supra* note 64, at 162; Spear, *supra* note 62, at 121-126.

[73] *See, e.g.*, Eshel et al., *supra* note 66, at 1270-1271; Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., *supra* note 10, at 1765.

and self-control.[74] Indeed, studies have shown that the prefrontal cortex is among the last areas in the brain to mature fully.[75] These findings suggest a

> basic framework, articulated in slightly different versions by many writers ... posit[ing] that middle adolescence is a time of heightened vulnerability to risky and reckless behavior because of the temporal disjunction between the rapid rise in dopaminergic activity around the time of puberty, which leads to an increase in reward-seeking, and the slower and more gradual maturation of the prefrontal cortex and its connections to other brain regions, which leads to improvements in cognitive control and in the coordination of affect and cognition. As dopaminergic activity declines from its early adolescent peak, and as self-regulatory systems become increasingly mature, risk-taking begins to decline.[76]

"From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving."[77]

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[74] Steinberg, *supra* note 64, at 161.

[75] Gogtay & Thompson, *supra* note 66, at 7; Casey et al., *supra* note 61, at 243; Spear, *supra* note 62, at 87-88.

[76] Steinberg, *supra* note 64, at 161; *see* Somerville et al., *supra* note 71, at 126-127.

[77] Steinberg, *supra* note 64, at 162.

Although the precise relationships between particular aspects of brain development and adolescent behavior continue to be studied, these findings regarding the neuroscience of adolescent development reinforce and expand upon the well-established behavioral findings discussed in *Roper* and *Graham*. They demonstrate that, even in late adolescence, important aspects of brain maturation remain incomplete. And those normal patterns of adolescent physiological development are correlated with the poor judgment and particular vulnerability to negative social influences that characterize adolescence and then subside in young adulthood. Unlike adults, juveniles may thus be expected to change as they age and their brains mature, evincing both fewer impulses toward reckless and criminal behavior and an increased ability to restrain such impulses.

II. SENTENCING JUVENILES TO LIFELONG IMPRISONMENT WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT

In *Graham*, this Court determined that a sentence of life without parole for juvenile offenders convicted of non-homicide offenses was constitutionally disproportionate punishment for two related reasons—both of which are equally powerful as applied to juveniles convicted of homicide.

First, juveniles' immaturity, vulnerability, and changeability—while in no way excusing their crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569-570. The Court thus reaffirmed in *Graham* that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." 130 S. Ct. at

2026-2027. At the same time, the Court recognized that "[l]ife without parole is an especially harsh punishment for a juvenile," because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2028. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* In fact, a juvenile sentenced to life in custody not only serves a greater percentage of his life in prison, but suffers a unique deprivation: He will never experience adulthood—or the ability "to attain a mature understanding of his own humanity," *Roper*, 543 U.S. at 574—as a free person.

Sentences that foreclose any possibility of eventual release are thus particularly draconian for juveniles. Although adolescents can be expected to mature and reform as they age, such a sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham*, 130 S. Ct. at 2027. Juvenile crimes are committed "while [the offender is] a child in the eyes of the law," *id.* at 2033, meaning that most juvenile offenders are sentenced to life imprisonment without ever having been initiated into such elementary aspects of adult society as voting, driving, marriage, parenthood, profession—even high-school graduation. For adolescent offenders, a sentence of "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 2032. Given juveniles' reduced culpability and increased likelihood of reform, such a severe sanction—foreclosing any willingness even to consider release in the future—is mani-

festly disproportionate to the penological justifications for imposing it.

Neither this Court's precedent nor the research into adolescent development provides any reason why this analysis should be different in the case of juvenile homicide offenders. This Court first recognized the reduced culpability of adolescent offenders in the context of prohibiting the death penalty for juvenile homicide offenses, finding that even for older adolescents, and "even [for] a heinous crime," the immaturity, vulnerability, and changeability of juvenile offenders made it "less supportable to conclude that ... [a] crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. To be sure, more serious crimes call for more serious punishments. But there is no reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense. Indeed, the best available research indicates that even serious juvenile offenders are far more likely than not to desist from criminality as they mature, and that it is equally true of the most serious offenders that "expert psychologists [cannot] differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.[78]

Accordingly, the penological justifications for a sentence of life imprisonment without parole are weakened for juveniles who commit homicide, just as they are for other juvenile offenders. The retributive purpose of such a punishment is attenuated because "cul-

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[78] *See supra* p. 24 & nn. 56-59.

pability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to anticipated immediate rewards rather than longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. *Id.*[79] Life without parole will unquestionably incapacitate a juvenile offender, but the Court rightly noted in *Graham* that justifying "life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible," when "[t]he characteristics of juveniles make that judgment questionable." 130 S. Ct. 2029. And it is particularly inappropriate to "forswear[] altogether the rehabilitative ideal," *id.* at 2030, with respect to offenders who are far more likely than any others to reform as both their character and their physical brain structure mature into adulthood.

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[79] Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. *E.g.*, Simon Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-532 (1988) (comparing juvenile arrest statistics before and after enactment of New York's transfer legislation and finding little measurable impact on serious juvenile crime); Eric Jensen & Linda Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994) (same for Idaho).

In short, this Court has recognized what research confirms: Adolescence is transitory, and juveniles change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration. And, even in the case of the most serious offenses, there is no reliable way to distinguish the juvenile offender who might become a hardened criminal from the far more common offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to life imprisonment "without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033, disregards entirely the signature characteristics of youth. And sentencing such an immature and less culpable juvenile to spend his entire adult life in prison, notwithstanding the likelihood that "[m]aturity can lead to ... remorse, renewal, and rehabilitation," *id.* at 2032, is grossly disproportionate punishment.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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Respondent.

KUNTRELL JACKSON,
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RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,
Respondent.

On Writs Of Certiorari To The Court Of Criminal Appeals Of Alabama And The Supreme Court Of Arkansas

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Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) (Oct. 13, 2009) available at www.usfca.edu/law/docs/jlwop/graham/ 14

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AMICUS BRIEF ON BEHALF OF PETITIONERS MILLER AND JACKSON

STATEMENT OF INTEREST[1]

Amnesty International, the Amsterdam Bar Association, the Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK), the Barcelona Bar Association, the Bar Human Rights Committee of England and Wales, the Bar of Montreal,the Center for Constitutional Rights, Columbia Law School Human Rights Institute, the Czech Bar Association, the European Bars Federation/Fédération des Barreaux d'Europe, the General Council of the Bar (GCB) of South Africa, the Hong Kong Bar Association, Human Rights Advocates, Human Rights Watch, the Japan Federation of Bar Associations, the Law Council of Australia, the Law Society of England and Wales, the Law Society of New South Wales, the New Zealand Law Society, the Norfolk Island Bar Association, the Norwegian Bar Association, the Portuguese Bar Association, the Swedish Bar Association, the Union Internationale des Avocats (UIA-International Association of Lawyers), the University of Minnesota Human Rights Center, and the University of San Francisco (USF) Center

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[1] Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

for Law and Global Justice hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioners. The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion, as well as foreign practice, when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards and practice prohibiting sentencing juvenile offenders to life in prison without the possibility of parole provide an important indicator of evolving standards of decency, which illuminate the contours of acceptable conduct under the Eighth Amendment. Treaties the United States is party to are relevant to this analysis. The United States is the only country in the world that does not comply with the norm against imposing life without possibility of parole sentences on offenders who are under the age of 18 at the time of the offense.[2]

Prohibiting the sentence imposed in these cases would bring the United States into alignment with one of the most widely accepted international human rights norms, and enhance compliance with treaty obligations. Formally recognizing the unconstitutionality of these sentences would uphold

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[2] Life without possibility of parole sentences are sometimes referred to by the acronym "LWOP." Similarly, juvenile life without the possibility of parole sentences are sometimes referred to as "JLWOP."

the Eighth Amendment principles that led this Court to strike down the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005), and juvenile life sentences without parole for non-homicide crimes in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought; and throughout U.S. history, courts have referred to international standards when considering the constitutionality of certain practices. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. The point, as the Court explained in *Graham*, is not that the Eighth Amendment is governed by international law, but rather that as a matter of U.S. constitutional law, the Court must consider contemporary standards of decency, as informed by international (and foreign) law and practice. Thus, *amici* consider international law and practice with respect to sentencing of juvenile offenders to life without parole to be of particular relevance to this Court.

Virtually every other country in the world either has never engaged in or has rejected the sentencing of persons convicted of crimes committed when they were under 18 to life without possibility of parole. The few countries in which juveniles were previously reported to be serving life

sentences without parole have either changed their laws or explained that juvenile offenders can apply for parole.[3]

Universally accepted standards condemn sentencing juvenile offenders to life without the possibility of parole. All countries except the United States and Somalia are parties to the Convention on the Rights of the Child, which prohibits the sentence. Several treaties that the United States is party to have also been interpreted to prohibit the sentence.

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[3] There is one case in Argentina that has raised questions about whether someone *might* be serving such a life sentence, but the sentence appears to be based on crimes committed as a juvenile and as an adult, and the sentence is otherwise subject to challenge under the laws of Argentina. (Communications with Argentinean Counsel for Saúl Cristian Roldán Cajal, emails on file with counsel for *amici*). Mr. Cajal's case is included in a petition pending before the Inter-American Court of Human Rights challenging life sentences with parole. *See* Case No. 12,651, *César Alberto Mendoza, et al. (Perpetual imprisonment and confinement of adolescents)*, Inter-Am. Ct. H.R., submitted June 17, 2011.

As this Court has recognized in other cases, a small number of outlier jurisdictions does not detract from the importance of foreign and international opinion and practice. *E.g., Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (that only 3 of 60 nations retain death penalty for rape "not irrelevant" to constitutional analysis); *Roper*, 543 U.S. at 578 (non-unanimous but widespread adherence to norm informs contemporary standards of decency).

This Court considered international law when holding that the juvenile death penalty violates the Eighth Amendment, *Roper*, 543 U.S. at 575-79, and again when it struck down life sentences without parole for offenders under 18 convicted of non-homicide crimes. *Graham*, 130 S. Ct. at 2033-34. Many of the international norms considered in *Roper* and *Graham* apply equally to *any* life without parole sentences applied to juvenile offenders, and those norms equally support overturning Mr. Miller and Mr. Jackson's sentences here.

The community of nations rejects sentencing any juvenile offender to die in prison, whatever the offense. Allowing the practice to continue in the United States would be inconsistent with contemporary standards of decency and contrary to the Eighth Amendment. The appropriate remedy is to ensure that persons incarcerated for crimes committed when they were under the age of 18 have a meaningful opportunity to obtain release at the end of a term of years sentence or through parole consideration.

ARGUMENT

I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL

The United States is the only nation in the world that currently imposes life without parole

sentences on juveniles. *See* Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments never allowed, expressly prohibit, or currently do not impose such sentences on children. *Id.* at 989-90. While a few countries other than the United States have statutory language that arguably permits sentencing juvenile offenders to life without parole, there is no known person to be serving such a sentence anywhere in the world other than the United States. *Id.* at p. 990.

Pursuant to *Graham v. Florida* and this Court's jurisprudence, the laws of other countries and international practice and opinion are relevant to the determination of whether a sentence is cruel and unusual under the United States Constitution. *Graham*, 130 S. Ct. at 2033-34; *see also Roper*, 543 U.S. at 575-79. There is clear international consensus against sentencing a juvenile offender to die in prison, and of equal importance, the United States is party to human rights treaties that have been interpreted to prohibit life sentences for juvenile offenders. The Court should consider both of these factors in determining whether the sentences at issue violate the Eighth Amendment.

A. International Practice and Opinion Inform the Court's Eighth Amendment Analysis

The laws of the United States reflect the influence of laws and opinions of other members of the international community. Indeed, the

Declaration of Independence itself speaks to the significance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence para. 1 (U.S. 1776) (emphasis added). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004).

In urging courts to afford the requisite "decent respect to the opinions of mankind" Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations – the global opinions of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and The American Founding* 250-51 (2005).

John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America*, Preface, (1797), *available at*

http://www.constitution.org/jadams/ja1_00.htm (Da Capo Press Reprint ed., last visited Jan. 10, 2012).

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the scope and content of societal norms and Constitutional rights. In *Roper*, this Court struck down juvenile death sentences, considering both the evolution of international law and practice in the global community as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Roper*, 543 U.S. at 575-78.

In *Graham v. Florida*, the Court again recognized the value of "the judgment of the world's nations," citing foreign laws and international practice and opinion that prohibit life without parole for juveniles as evidence that "demonstrates that the Court's rationale has respected reasoning to support it." *Graham,* 130 S. Ct. at 2034. The Court in *Graham* further recognized that the U.N. Convention on the Rights of the Child, ratified by every country except Somalia and the United States, explicitly prohibits juvenile LWOP sentences, that countries had taken measures to abolish the practice in order to comply with the Convention on the Rights of the Child, and that the provisions and status of the Convention on the Rights of the Child are evidence of international opinion. *Id.* at 2033-34. The Court found that "'the United States now stands alone in a world that has turned its face against'" life without parole sentences for juvenile non-homicide offenders. *Id.* at 2034, (quoting *Roper*, 543 U.S. at 577).

In his concurrence, Justice Stevens reaffirmed the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "'evolving standards of decency.'" *Graham,* 130 S. Ct. at 2036 (Stevens, J., concurring) (quoting *Weems v. United States,* 217 U.S. 349, 373–378 (1910).). The rationale of *Graham* should apply equally to a life sentence without parole for a juvenile offender when the crime committed was a homicide.

In the past 50 years, this Court's jurisprudence on issues of cruel and unusual punishment has reflected "evolving standards of decency" in "civilized" society. The standards are not frozen in time, and the Court has consistently relied upon international law, practices and customs as part of the constitutional analysis. Indeed, the very constitutional provision at issue in this case, the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origin directly to the laws of another nation. The phrase "cruel and unusual" is derived from the "Anglo-American tradition of criminal justice" and the principle it represents goes back to the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The term was taken directly from the English Declaration of Rights of 1688. *Id.*

In *Trop v. Dulles,* the Court expounded upon the role of the fundamental norms of dignity and civility in interpreting the Eighth Amendment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the

Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100. Recognizing that the text of the Eighth Amendment is "not precise" and its meaning "is not static," the Court has underscored that it is both appropriate and necessary to look abroad to "evolving standards of decency" to determine which punishments are so disproportionate as to be cruel and unusual. *Id.* at 100-01. Thus, the Court noted that the "civilized nations of the world are in virtual unanimity that statelessness [the punishment at issue in *Trop*] is not to be imposed as punishment for crime." *Id.* at 102.

In *Coker v. Georgia*, the Court again considered "the climate of international opinion concerning the acceptability of a particular punishment." *Coker,* 433 U.S. at 596 n.10. In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, the Court acknowledged that "[it] is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.*

In *Enmund v. Florida*, the Court invoked *Coker* reiterating that international opinion is an additional consideration which is "not irrelevant." *Enmund v. Florida,* 458 U.S. 782, 796 n.22 (1982) (quoting *Coker*, 433 U.S. at 596 n.10). The Court went on to find the death penalty cruel and unusual punishment for felony murder. *Id.* at 798 The Court, citing foreign law, noted that the "doctrine of felony murder has been abolished in England and India, severely restricted in Canada

and a number of other Commonwealth countries, and is unknown in continental Europe." *Id.* The decision also reflects foreign practice, stating "[i]t is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act." *Id.*

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views expressed by "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community" when concluding that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of committing first degree murder when he was 15 years old. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Court further referenced its own practice of looking outward in its Eighth Amendment analyses: "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Id.* at 830 n.31. More recently, in *Atkins v. Virginia*, the Court stated: "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

In *Roper v. Simmons*, the Court relied upon the "evolving standards of decency" reasoning applied in *Trop* and *Thompson* and looked to international law, practice and opinion to

categorically prohibit juveniles from receiving the death penalty. *Roper*, 543 U.S. at 575-78 ("Yet at least from the time of the Court's decision in *Trop*. the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments."). In applying the Eighth Amendment's prohibition on cruel and unusual punishment, the Court gave due deference to international treatment of juvenile offenders. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Id.* at 578.

In *Graham v. Florida*, the Court, quoting *Roper*, explicitly reaffirmed the relevance of international practice and opinion: "['The opinion of the world community, while not controlling our outcome,'] provide[s] respected and significant confirmation for our own conclusions." *Graham*, 130 S. Ct. at 2035 (quoting *Roper*, 543 U.S. at 578). Justice Stevens' concurrence acknowledges that "evolving standards of decency" have played a central role in Eighth Amendment jurisprudence for decades and will continue to do so.

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and

> experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7–year–old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

Graham, 130 S. Ct. at 2036 (Stevens, J. concurring).[4]

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[4] Justice Thomas asserted that some countries' laws permit LWOP sentences *Id.* at 2053 n.12 (Thomas, J., dissenting), but as the very source he relied on explains, courts in those countries have *not* sentenced juvenile offenders to life without parole—for homicide or non-homicide offenses. *See* Child Rights International Network, Connie de la Vega, et. al., Human Rights Advocates, *Statement on Juvenile Sentencing to Human Rights Council*, 10th Sess. (Nov. 3, 2009), available at http://www.crin.org/resources/infodetail.asp?ID=19806 ("Currently, there is no evidence of any country, besides the United States, with juvenile offenders sentenced to life without the possibility of release."); *see also* Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) (Oct. 13,

The global consensus against the death penalty and life without parole sentences for juveniles informed the United States Supreme Court's decisions to strike down those sentencing practices as cruel and unusual punishments in *Roper* with respect to death penalty and in *Graham* with respect to JLWOP for non-homicide crimes. *Roper*, 543 U. S. at 578; *Graham*, 130 S. Ct. at 2033-2034. Similarly, international consensus regarding juvenile life without parole sentences for homicide offenses should inform the Court's analysis here.

B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense

Foreign law and practice, and international agreements, including treaties to which the U.S. is a party, reflect a global consensus that life without parole sentences should be prohibited, regardless of the crime, if the offender was under the age of 18 at the time the crime occurred.

1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences

As international human rights law has developed and gained broader acceptance, most countries have followed suit, eliminating sentencing practices that contravene human rights

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2009), available at www.usfca.edu/law/docs/jlwop/graham/.

principles. But there is nothing new or revolutionary about recognizing the impermissibility of sentencing juvenile offenders to life without parole. Indeed, very few countries have *ever* imposed life sentences on juvenile offenders. *Sentencing our Children to Die*, *supra*, at 989-1007. Most governments (unlike the United States) have either never allowed, expressly prohibited, or in practice do not impose such sentences on juvenile offenders. *Sentencing our Children to Die*, *supra*, at 989-90.

Consistent with international law, practice and opinion, an irreducible sentence of life imprisonment is not imposed on a child in any country in Europe. The majority of European countries do not allow any type of life sentences for juvenile offenders. *See* Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39-48 (Oct. 2010). Generally, throughout Europe, the maximum sentence for juvenile offenders is ten years, though this may increase up to 15 years in cases that involve a very serious crime. *Id.* (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty-- Comparative Aspects*, Juvenile Justice Systems in Europe—Current Situation and Reform Developments 1772 (2010)).

The range of permissible sentences varies by country: the maximum sentence in Portugal is three years (including for murder); the maximum in Switzerland is four years (including for murder);

it is five in the Czech Republic; 10 in Estonia, Germany and Slovenia; and up to 20 in Greece and Romania. *Id.*[5] In England and Wales, a person under 21 cannot receive a whole life tariff, the equivalent of an LWOP sentence, because Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 restricts such sentences to persons aged 21 or older.[6] In the Netherlands and Scotland, there is the (theoretical) possibility of life imprisonment *with* the possibility for parole, restricted to juveniles at least 16 years in age. *Id.* But in none of those countries do the courts impose sentences of life *without* parole on juvenile offenders.

Other than the United States, some of the few countries that previously allowed JLWOP sentences have since ended the practice in accordance with their international human rights law obligations. *Sentencing our Children to Die*, *supra*, at 996-1004. Tanzania has committed to allow parole for the one under-18 offender potentially serving the sentence and to clarify its laws to prohibit the punishment. *Id.* at 996-99. Israel has clarified that parole consideration is available to juveniles serving the sentence, and South Africa has clarified that such sentences are not permitted. *Id.* at 999-1004. That the few countries that potentially had juvenile offenders serving a life without parole sentence have clarified

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5 This is applicable only in cases where the sentence for an adult offender would be life imprisonment.

6 *See* Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003, c.44.

that they allow for parole hearings in accordance with the international legal norms is further evidence that the sentence is not permitted under any circumstances.

Of the ten countries identified in 2007 as having laws that could permit the sentencing of juvenile offenders to life without parole (other than the United States)—Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka—there are no known cases where the sentence has been imposed. *Id.* at 990.[7] The majority of nations do not apply

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[7] Additional research clarifies that "life sentence" in Belize means 18-20 years without parole. Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004). In Brunei, while an offender under 18 may be detained during "His Majesty the Sultan and Yang Di-Pertuan's pleasure," the statute also provides that the child or young person (ages 14-18) may be released at any time and the case must be reviewed at least once a year. Children and Young Person's Order 2006, Section 45(1), (3), and (5).

Five additional countries have been identified as having similar ambiguous statutory language — Zambia, Sierra Leone, Fiji, Tonga and the Bahamas — but there is no evidence that any of these countries in fact imposes JLWOP. Each of these countries is party to the Convention on the Rights of the Child. While the penal codes in these jurisdictions have ambiguous language regarding JLWOP, the wording of the statutes suggests that there remains some mechanisms for review of life sentences or for potential release. Section 25(1) of the Fijian Penal Code specifies that "the court shall sentence such

person to be detained during the Governor-General's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody," providing discretion in the sentencing. Tongan Penal Code Section 91(2) notes that "[e]very person who attempts to commit murder shall be liable to imprisonment for life or any less period," and Tongan Courts have looked to human rights instruments regarding the validity of punishments. *See Fangupo v. Rex; Fa'oos v. Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) (overturning sentence of judicial whipping because contrary to Tonga's international legal obligations under the Convention Against Torture). Chapter 97 section 41 of the Penal Code of the Bahamas provides that those under the age of 18 are "to be detained during Her Majesty's pleasure; if so sentenced he shall notwithstanding anything in the other provisions of this Act," suggesting that a later review of the sentence is possible. Additionally, in Sierra Leone, section 216 of the Criminal Procedures Acts specifies that the juvenile should be confined to a chosen place as may be directed by the president and for a stated period of time until a juvenile's reformation and transformation is guaranteed. Although this does not prohibit JLWOP, it does suggest that there is evaluation of juveniles during incarceration and upon rehabilitation the potential for release. Finally, the Penal Code Act of Zambia Section 25(2) notes that "the court shall sentence him to be detained during the President's pleasure; and when so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct." This, in conjunction with subsection (3), which states that "the presiding Judge shall forward to the President a copy of the notes of evidence taken at the trial, with a report in writing signed by him

juvenile life without parole sentences because such sentences violate the principles of child development and protection established through national standards and international human rights law. *Id.* at 989. Courts in other countries often refer to the treaty obligations in cases involving human rights. *See, e.g.* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, "Maldonado, Daniel Enrique / recurso de hecho," Fallos (M-1022-XXXIX) (Arg.), *available at* http://www.mpf.jusbaires.gov.ar/wp-content/uploads/csjn-maldonado-daniel-enrique-y-otro-sobre-robo-agravado-07-12-2005.pdf (overturning life sentence of 14 year old offender for violating the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention Against Torture as well as Argentinean laws); *Fangupo v. Rex; Fa'ooa v. Rex*, *supra*, (Tonga) (citing Convention Against Torture as basis for overturning sentence of judicial whipping).

Even in the United States, the sentence was not used on a large scale until the 1990s when 40 states passed laws making it easier to try juveniles as adults. *See* P. Griffin, et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State*

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containing such recommendation or observations on the case as he may think fit to make" indicates that some discretion remains after the juvenile has been sentenced.

Transfer Provisions Foreword (National Center for Juvenile Justice 1998) www.ncjrs.org/pdffiles/172836.pdf. Before the 1990s, the sentence was imposed relatively infrequently anywhere. The Sentencing Project, *Juvenile Life Without Parole: Trends in Sentence Use Over Time* (May 2010), http://www.sentencingproject.org/doc/publications/ji_JLWOPTrends.pdf. As of 2008, the United States was the only nation where juveniles served life sentences without the possibility of parole.

2. International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences

International agreements and resolutions reflect that the community of nations rejects sentencing juveniles to life without parole regardless of the crime committed. *See, e.g.*, *Graham*, 130 S. Ct. at 2033-34. The Convention on the Rights of the Child, the most widely ratified human rights treaty, specifically condemns this practice. As noted in *Graham*, Article 37(a) of the Convention on the Rights of the Child, "prohibits the imposition of 'life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.'" *Graham*, 130 S. Ct. at 2034 (citation omitted).[8] Article 37(b) of

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[8] Because all countries in the world, aside from the United States and Somalia, are parties to the Convention, the practice of nations in this regard is arguably done pursuant to their legal obligations. In light of the practice and overwhelming authority

the Convention further provides that imprisonment be used only as a measure of last resort for juvenile offenders, and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Neither of those treaty provisions distinguishes between homicide and non-homicide offenses. Because Petitioners Miller and Jackson's sentences allow no possibility of release and are not the shortest appropriate time available, they are inconsistent with the Convention on the Rights of the Child and the international practice and opinion it reflects.

The significance of offender age in criminal sentencing is further highlighted by the fact that Article 37 sets a specific age ("below 18 years of age") in relation to sentences of life without parole, in contrast with other rights which in Article 1 defers to domestic laws for the age of majority. In early 2007, the authoritative Committee on the Rights of the Child, which oversees the Convention, reiterated that article 37 prohibits the death penalty and life without parole for offenders under eighteen years of age at the time of the offense. *See*

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prohibiting the sentence, the standard at a minimum may be considered as customary international law. *See North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 42 ¶ 71 (Feb. 20) (recognizing passage of treaty rule into the "general *corpus* of international law" as "one of the recognized methods by which new rules of customary international law may be formed").

Comm. Rts. Child, Children's Rights in Juvenile Justice, General Comment No. 10 ¶ 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).[9]

The prohibition on the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States. *See* American Declaration of the Rights and Duties of Man, art. VII (establishing the right of "all children . . . to special protection, care and aid"); American Convention on Human Rights, art. 19 ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state"); *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, doc. 5 rev. 1 ¶ 83 Inter-Am. C.H.R. (2002) (Art. 19 of the American Convention and Art. VII of the American Declaration reflect "the broadly-

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[9] Specifically, the Committee has recommended that "parties abolish *all* forms of life imprisonment for offences committed by persons under the age of eighteen." "For *all* sentences imposed upon children the possibility of release should be realistic and regularly considered." *Id.* ¶ 77 (*emphasis added*). General Comments constitute the authoritative interpretation of the Committee on the Rights of the Child, established by the Convention to administer the treaty. *See* http://www2.ohchr.org/english/bodies/crc/comments.htm. The prohibition of juvenile life without parole sentences has also been recognized as an obligation under treaties that the United States is party to. See, section C below.

recognized international obligation of states to provide enhanced protection to children"); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (Ser. A.) No. 17 ¶ 103 Inter-Am. Ct. H. R. (Aug. 28, 2002) ("measures that involve deprivation of liberty must be exceptional").

Beyond the rule's clarity in treaty law, a near universal consensus has coalesced over the past seventeen years that the sentence must be legally abolished, and the consensus has been repeatedly affirmed in recent years. Myriad United Nations resolutions adopted by consensus or upon vote, with the support of every country represented except the United States, call for abolition of the juvenile death penalty and life sentences without parole. Since 2009, however, *even the United States* has joined the consensus against the use of this sentence in votes on resolutions at the General Assembly.

Every year since 2006, in its annual Rights of the Child resolution, the United Nations General Assembly has called for immediate abrogation of the juvenile LWOP sentence by law and practice in any country still applying the penalty. From 2006-2008, the United States cast the lone dissenting vote. For example, on December 19, 2006, the General Assembly resolved by a vote of 185 to one (the United States) that nations should "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence." Rights of the Child, G.A. Res. 61/146 ¶ 31(a), U.N. Doc. A/Res/61/146

(Dec. 19, 2006). The General Assembly adopted a similar resolution by a vote of 183 countries to one (the United States) in December of 2007, Rights of the Child, G.A. Res. 62/141 ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). Rights of the Child, G.A. Res. 63/241 ¶ 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008).

In 2009 and 2010, the General Assembly affirmed the earlier resolutions, including the directive to abolish juvenile life without parole sentences, by a full consensus *without* a dissenting vote from the United States. Rights of the Child, G.A. Res. 64/146 ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009), and Rights of the Child, G.A. Res. 65/197 ¶ 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010). In 2010, the General Assembly adopted a resolution on the administration of justice specifically requesting that countries abolish the death penalty and life imprisonment without the possibility of release for offenders under eighteen years of age. The resolution on the administration of justice passed by consensus, without a dissenting vote from the United States. Human rights in the administration of justice, G.A. Res. 65/213 ¶ 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010).[10]

In its first substantive resolution on the Rights of the Child, the recently created United Nations Human Rights Council included the prohibition of juvenile life without parole

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[10] The texts of the 2011 General Assembly resolutions are not yet available online.

sentences. Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008), along with the prohibition of the death penalty for offenders under the age of 18 at the time of the crime.[11] In 2009 the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age." Human rights in the administration of justice, in particular of children and juvenile justice, H.R.C. Res. 2 ¶ 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the U.N. Human Rights Council) called specifically for governments to prohibit juvenile LWOP sentences along with the juvenile death penalty. Rights of the Child, Comm'n on Human Rights Res. 2005/44 ¶ 27(c), U.N. Doc. E/CN.4/2005/135 (April 19, 2005).[12]

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[11] The Commission on Human Rights was replaced by the Human Rights Council in 2005. The Human Rights *Committee* remains. Like the Commission, the Council is made up of government delegates.

[12] As in the UN General Assembly, members of the Commission on Human Rights acted as representatives of their governments, which means that a Commission resolution reflected government opinion. The resolution calling for abolition of juvenile life without parole sentences emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time, i.e., the opposite of an inflexible sentence that

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/RES/40/33 (Nov. 25, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, ¶ 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

Because the two sentences at issue here are out of step with international law, practice and opinion, there is compelling support to find that this sentencing practice is cruel and unusual. As the Court found in *Graham*, "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham*,

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requires imprisonment for a juvenile offender's whole life. *Sentencing Our Children to Die*, *supra*, at 1017-18 & n. 182.

130 S. Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, "'the overwhelming weight of international opinion against' life without parole for non homicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" *Id.* (quoting *Roper*, 543 U.S. at 578). The weight of global law, practice and opinion against life without parole for any under-18 offender, regardless of offense, similarly supports the conclusion that such a sentence is unconstitutional.

C. United States Treaty Obligations Are Relevant to Eighth Amendment Analysis

The United States is a party to several treaties that have been interpreted by their oversight bodies, and recognized by states parties, to prohibit juvenile life without parole sentences. As a treaty party, the United States has assumed international legal obligations that should inform the Court's Eighth Amendment analysis. And under the Constitution, the states of the United States must uphold these treaty obligations. U.S. Const. art. VI, cl. 2.

Treaties relevant to the Court's analysis include: (1) the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 (*entered into force* Mar. 23, 1976) (*ratified by the United States*, S. Treaty Doc. No. 95-20 (April 22, 1992)); (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention

Against Torture"), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) (*ratified by the United States*, S. Treaty Doc No. 100-20 (Oct. 27, 1990)); and (3) the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) (*ratified by the United States*, S. Treaty Doc. No. 95-18 (Oct. 21, 1994)). In ratifying these treaties, Congress stated, "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments." 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (for the International Covenant on Civil and Political Rights) (bold in original); *see also* 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) (same understanding regarding the Convention on the Elimination of All Forms of Racial Discrimination); 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (same understanding for the Convention Against Torture).

The prohibition on juvenile life without parole sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights. In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee, the body established under the treaty to monitor compliance and provide interpretation, has stated that it "is of the view that sentencing children to life sentence without parole is of itself not in compliance with

article 24(1) of the Covenant. (articles 7 and 24)." Human Rights Comm., Comments on the United States of America ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006) (hereinafter "Comments on the United States"). Further, the Human Rights Committee determined that a life without parole sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the Human Rights Committee: United States of America ¶ 14, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). Article 14(4) of the Covenant further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, art. 14(4).

The Committee Against Torture, the body established for oversight by the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

Most recently, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight

body for Convention on the Elimination of Racial Discrimination, found the juvenile without parole sentence incompatible with Article 5(a) of the Convention on the Elimination of Racial Discrimination because the sentence is applied disproportionately to youth of color, amounting to pervasive discrimination that the United States has failed to address. CERD, Concluding Observations of CERD on the United States ¶ 21, U.N. Doc: CERD/C/USA/CO/6 (May 8, 2008). The Committee referred to the concerns raised by the Human Rights Committee and Committee Against Torture on the United States practice of sentencing juveniles to life without parole and added its own conclusion:

> The Committee therefore recommends that the State Party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

Id.

In light of the U.S. Constitution and U.S. treaty obligations, this Court should consider the views of the treaty oversight bodies in determining whether a life sentence without parole for any under-18 offender violates the Eighth Amendment

prohibition against cruel and unusual punishments.[13]

CONCLUSION

As in *Roper* and *Graham*, this Court should consider the laws, practices and opinions of other nations and international agreements in interpreting and applying the Eighth Amendment. This Court should find these same principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. Further, it should consider the provisions of treaties to which the United States is a party. For the reasons stated above, the sentences of Mr. Miller and Mr. Jackson should be overturned.

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[13] In considering the treaties for the purpose of interpreting the Eighth Amendment, the Court need not address the issue of whether the treaty provisions are self-executing or the validity of the non-self-executing declarations the United States submitted in connection with ratifying some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). This Court has applied treaty provisions in defensive postures without considering whether they are self-executing. *See United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992) (*rev'd on other grounds, Sosa*, 542 U.S. at 692).

Respectfully submitted,

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Bar of Montreal
Center for Constitutional Rights
Columbia Law School Human Rights Institute
Czech Bar Association
European Bars Federation/Fédération des Barreaux d'Europe General Council of the Bar (GCB) of South Africa
Hong Kong Bar Association
Human Rights Advocates
Human Rights Watch
Japan Federation of Bar Associations
Law Council of Australia
Law Society of England and Wales

Law Society of New South Wales
New Zealand Law Society
Norfolk Island Bar Association
Norwegian Bar Association
Portuguese Bar Association
Swedish Bar Association
Union Internationale des Avocats (UIA-International Association of Lawyers)
University of Minnesota Human Rights Center
University of San Francisco Center for Law & Global Justice[14]

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[14] Research assistance was provided by Professor Julian Killingly, Birmingham City University School of Law and Solicitor of the Supreme Court (UK) and his students; Mark George, Queen's Counsel; and Hannah L. Gorman, Solicitor of the Supreme Court (United Kingdom); staff at the Law Society of England and Wales; Fellows and students at the University of San Francisco School of Law; and staff at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005). It has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Amsterdam Bar Association ('Amsterdamse orde van Advocaten') is the professional body of lawyers, practicing in the district of the Amsterdam Court. The membership is mandatory. The Amsterdam bar organization, representing over 5,000 lawyers, has as a task to further good practice by lawyers and to protect the rights and interests of their members as lawyers, as well as the administration of justice.

The Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK) is the official representation of lawyers in Austria, a public body determined by law, which is responsible for safeguarding their rights and affairs and their

representation at national, European and international level. It is as such particularly responsible for proposing legislative acts and rendering opinions on legislative projects as well as for notifying deficiencies in the administration of justice and administration to the competent body and providing proposals in order to improve the administration of justice and administration.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons,* 543 U.S. 551 (2005) and *Sullivan v. Florida* and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Barcelona Bar Association now has more than 21,000 members; 16,000 are active and 6,000 do not exercise as lawyers but enjoy certain rights as members of the Bar. The Association aims at guaranteeing the professional interests of the law profession but also watching for the accomplishment of the profession's deontological rules, with a distinct vocation for serving the community. The Association exercises

deontological control, regulates on matters of fees, fights against professional intrusion, organizes and provides legal aid to those with no financial resources, and to persons held in detention.

The Bar of Montreal, with over 13,000 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is committed to the creative use of law as a positive force for social change.

Columbia Law School's Human Rights Institute (HRI), founded in 1998, serves as a crossroads for practitioners, scholars, and activists,

and as a focal point for Columbia Law School's human rights curriculum, programs and research. HRI leverages these academic resources into support for human rights in the United States and throughout the world. As part of its work to promote human rights in the United States, HRI, in conjunction with Columbia Law School's Human Rights Clinic, is co-counsel in *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole. HRI also participated as *amicus* in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Czech Bar Association is the biggest legal professional organization in the Czech Republic representing more than 8,500 lawyers. It is a self-governing organization performing public administration in the area of the Legal Profession and, as such, it protects and guarantees the quality of the provision of the legal services by lawyers.

The European Bars Federation/Fédération des Barreaux d'Europe (FBE) was founded in Barcelona on 23rd May 1992, as a successor to the « Conférence des Grands Barreaux d'Europe ». Its official headquarters are in Strasbourg. FBE membership is open to all national and local Bars and Law societies within the Council of Europe. Today, the FBE has 250 member bars, representing approximately 800 000 lawyers. Its principal objects are: to put in place common activity while respecting its members' autonomy and

independence; to establish a permanent link between Bars with the organization of periodic meetings; to represent the Advocacy with all the European Institutions; to promote the supremacy of law, the right to a fair trial and human rights, an item in which it is particularly and strongly involved this year; and to promote the harmonization of the profession in Europe equally in forensic activity and profession ethics, and all possible contacts with lawyers of the other Continents.

The General Council of the Bar (GCB) of South Africa is a voluntary association constituted by ten South African bars. The advocates who are members of the General Council of the Bar of South Africa are in private practice and are competitive specialist advocates who are experts in trial, motion court, appellate and opinion advocacy. One of GCB's objects is to promote the administration of justice.

The Hong Kong Bar Association is the professional organization of all practicing Barristers in Hong Kong totaling over 1,100 members. Matters of policy are decided by the Bar Council with the support of its various Special Committees. The Association is principally concerned in considering and taking appropriate action in respect of all matters concerning the legal profession in general and speaking up on issues relating to the administration of justice. The Association is a staunch supporter in upholding human rights and the rule of law.

Human Rights Advocates (HRA), a California non-profit corporation was founded in 1978 and has national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years, where it has addressed the issue of juvenile sentencing. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases it has participated in include: *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For over 30 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all persons, including youth and prisoners. To fulfill its mission, Human Rights Watch investigates allegations of human rights violations in the United States and over 80 countries throughout the world by gathering information from governmental and other sources, interviewing victims and witnesses, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights before

government officials and in the court of public opinion. In 2004, Human Rights Watch published *Thrown Away*, on youth offenders sentenced to life without parole in Colorado. In 2005, Human Rights Watch co-published *The Rest of Their Lives*, a national report on the sentencing of youth offenders to life without parole. Subsequently, in 2008, the organization published *When I Die They'll Send Me Home*, on the same topic in California. In 2009, the organization published updated national statistics on youth offenders serving life without parole throughout the United States. The organization has also advocated on the issue before the Committee against Torture, the Human Rights Committee, and the Committee on the Elimination of Racial Discrimination.

The Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the 52 bar associations in Japan, their individual members, and the legal professional corporations. Founded in 1949, the JFBA self-regulates the legal profession and strives to further the primary role of attorneys in society: the protection of fundamental human rights and the realization of social justice. Aiming for a judicial system that is familiar, open, and accessible to the public, the JFBA has been engaged in the reform of the judicial system.

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council represents its constituent bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law. Through this

representation the Law Council effectively acts on behalf of 56,000 legal practitioners in Australia. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society regularly intervenes in cases that relate to its core mandate. It has previously submitted *amicus curiae* in cases before the United States Supreme Court, including *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Sullivan v. Florida* and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Law Society of New South Wales is the largest professional association of lawyers in Australia. The Law Society acts as the voice of the legal profession, representing the interests of over 21,000 members, encouraging debate and actively driving law reform issues through policy submissions and open dialogue with Governments, parliamentary bodies, the Courts and the Attorney General's Department. Endowed with co-regulatory duties with the Office of the Legal Services Commissioner, it sets and enforces professional standards, licenses solicitors to practice, investigates complaints and administers discipline to ensure that both the community and the

profession are properly served by ethical and responsible solicitors.

The New Zealand Law Society is the statutory regulator of the legal profession in New Zealand (currently comprising 11,500 practicing lawyers). The Law Society's regulatory functions include fundamental obligations to uphold the rule of law and the administration of justice, and it actively monitors and promotes the rule of law and human rights. The Law Society has previously made submissions as *amicus curiae* to this Court.

The Norfolk Island Bar Association is the professional body representing lawyers on and from Norfolk Island. It consists of barristers, solicitors and judicial officers. It is a corporate member of the International Bar Association, the Human Rights Institute and the European Association of Lawyers. Its members are active in many countries of the world.

The Norwegian Bar Association is the representative organization for more than 90% of the lawyers in Norway. The Association safeguards the basic principles of the legal profession, such as independence and professional confidentiality. Furthermore, the Association is the most important arena for the lawyers' political engagement in relation to the rule of law.

The Ordem dos Advogados Portugueses (OAP) in English, Portuguese Bar Association, was established by the State, Decree n.° 11 715, of 12 June 1926, over 85 years ago. However, its origins

trace even back to the Lisbon Lawyers Association, whose Statutes were approved in 1838. The Ordem dos Advogados is the only public and independent association (nationwide) compulsory representing law graduates who practice law and deliver legal services (advocacia) as a profession, presently counting 27,903 active Lawyers.

The Swedish Bar Association is the sole national organization for advocates in Sweden, a professional body representing more than 5,000 advocates. Its international focus includes upholding the independence of the legal profession, the rule of law and human rights in Europe and throughout the world.

The Union Internationale des Avocats (UIA-International Association of Lawyers) was created in 1927 and is the oldest professional association, with several thousand individual members, as well as more than 200 bar associations, organisations or federations (representing nearly two million lawyers) from over 110 countries. The objectives of the UIA are to promote the basic principles of the legal profession, to contribute to the establishment of an international legal order based on the principles of human rights and justice among nations, through the law and for the cause of peace, and to defend the moral and material interests of members of the legal profession.

The University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that

all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigration status. The HRC maintains one of the largest human rights document collections in the United States (http://www.umn.edu/humanrts). In addition, the Co-Director of the University of Minnesota Human Rights Center has served from 1996 – 2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the international human rights law applicable to this matter. The HRC has previously submitted amicus curiae briefs; for example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice. For over five years the Center has been working on projects addressing the sentencing of juvenile offenders.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-9646 & 10-9647

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Supreme Court of the United States

EVAN MILLER

Petitioner,

v.

STATE OF ALABAMA

Respondent.

KUNTRELL JACKSON

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICI CURIAE OF CERTAIN FAMILY MEMBERS OF VICTIMS KILLED BY YOUTHS IN SUPPORT OF PETITIONERS

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I

INTEREST OF *AMICI*[1]

Amici, some of whom submitted testimonials as amici in *Graham v. Florida*, 560 U.S. ___ (2010) (slip opinion), are individuals who have lost family members to murder committed by youth, yet are opposed to life sentences for youth without the possibility of parole. While each account and experience is different, *amici* are united in their belief that, if given the chance, individuals incarcerated as children can change and become positive contributors to society.

SUMMARY OF ARGUMENT

Despite their devastating losses, *amici* know from experience what science confirms: children are fundamentally redeemable. *Amici* therefore believe youthful offenders should be offered a legitimate chance through rehabilitation to lead productive, law-abiding lives. *Amici* agree – fully – with the Court: "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Graham*, Slip Op. at 48.

"Juveniles are more capable of change than are adults," *Graham*, Slip Op. at 39, and thus *amici* support a fair and balanced approach to sentencing youth for serious crimes such as murder. Such an approach should impose a sentence that offers the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

opportunity for the court to review and consider, even if many years later, whether individuals convicted of crimes as juveniles continue to pose a threat to the community, or whether they have shown signs of development, healing, rehabilitation, and the potential to become productive members of society.

Graham's "meaningful opportunity for release based on demonstrated maturity and rehabilitation" is not a guarantee of release to youth offenders, just a review – the opportunity to demonstrate that they are capable of making responsible decisions and that they do not pose a threat to society. A life sentence without possibility of parole, for a crime committed at 14, does not provide that opportunity. Even when children commit the ultimate crime, they should have the opportunity to prove they are worthy of a second chance.

ARGUMENT

I. SENTENCING YOUTHS TO LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNJUST BECAUSE THEIR BRAINS AND SENSE OF JUDGMENT ARE NOT FULLY DEVELOPED, AND THEY RETAIN THE POTENTIAL FOR REFORM AS THEY GROW.

The Eighth Amendment's prohibition of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). One such measure is the respect the federal government and all 50 states have afforded victims' voices in

sentencing defendants, including juveniles. *See, e.g.*, Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes); Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2004). *Amici* therefore urge the Court to hear their stories of loss and redemption.

Amici have experienced first-hand what the Court and science agree has always been true: adolescents are less capable of controlling their behavior than adults. Recent advances in psychological, neurological and behavioral studies objectively confirm that children cannot appreciate consequences and assess risk and harm the way adults can, in part because their brains continue to develop through their teen years. *See, e.g.*, L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehav. Revs. 417, 421 (2000); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 9-11 (1992); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 742 (2000); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 Developmental Med. & Child Neurology 4 (2002). Given these truths about adolescent behavior, *amici* believe punishing children to the same extent as adults, when they cannot control their actions as well as adults, is wrong.

Thus, this group of victims writes in support of the petitioners and urges the Court to find that the sentence of life without the possibility of parole for a youth is excessive and unsupportable. "[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring). The Court's criteria for determining what sanctions are excessive comes from not one but two different analyses. As the Court has stated many times, one factor is "objective criteria," such as legislative enactments (*See, e.g., Solem v. Helm*, 463 U.S. 277, 292 (1983); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *United States v. Bajakajian*, 524 U.S. 321 (1998). But a second and equally valid criteria for analysis of the question is the individual judgment of the members of this Court. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding death "excessive" for a mentally retarded defendant); *see Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty "excessive" for crime of rape a 16 year old); *see also, Enmund v. Florida*, 458 U.S. 782 (1982) (death excessive for a murderer who did not intend to kill). In his dissent in *Baze*, Justice Ginsburg pointed out that in *Atkins* in particular, this Court found "objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Baze v. Rees*, 553 U.S. 35, 83 (2008), and 80 *citing Atkins*, 536 U.S. at 312 (*quoting Coker*, 433 U.S. at 597 (plurality opinion)).

The accounts of victims below show that sentencing needs to consider more than just proportionality – it is not just an eye for an eye. A reasoned sentence for youth who commit an act that took a life should strive to incorporate principles of restorative justice for the victim, the community and the criminal justice system, which includes the defendant. In this vein, the accounts here are about reconciliation and rejuvenation, not retribution. They are about finding a way to forgiveness and a newfound sense of peace where violence once reigned. These accounts demonstrate specific, documented efforts to make sense of tragic loss and find peace between parties who were brought together as a result of violence.

II. DESPITE EXPERIENCING THE MURDER OF A LOVED ONE AT THE HANDS OF A YOUTHFUL OFFENDER, MANY VICTIMS DO NOT BELIEVE THAT A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS RIGHT FOR YOUTHS.

Not in my name – that is the message resounding from victims in this brief. Through their vivid accounts, *amici* illustrate that constitutional standards cannot be met by sentences that ignore science and fail to address the needs of victims and their communities. Science already presented to this Court in the merits brief shows that youth – even youth who murder – lack critical developmental maturity. The same lack of full development that makes them susceptible to bad acts is the basis of their ability to reform – they are not yet fully accountable adults. *Amici* believe these offenders should be permitted to rehabilitate

themselves and return to society as positive, productive citizens.

A. Victims Know That A Youthful Offender Lacks Maturity At The Time Of Their Crime.

Sharletta Evans

Casson Xavier Evans was Sharletta Evans' younger son. On December 21, 1995, Casson was caught in the crossfire of a drive-by shooting, ending his life at age three. Sharletta had gone to her niece's house to pick up her niece's child. She left her sleeping younger son in the car with her six year old son and their older cousins. While inside her niece's house Sharletta heard gun shots and then broken glass. Once she accounted for the safety of everyone in the house, Sharletta returned to her car thinking nothing was wrong. But as she started to drive away, she realized Casson was bleeding and lifeless. He had been killed by a stray bullet.

Raymond Johnson, age 14, was charged as the shooter, Paul Littlejohn, age 15, was charged as the accomplice, and another boy, aged 14, was charged as the driver.

Sharletta attended each day of the trials of Raymond and Paul, who were tried as adults. Still in shock, overcome by grief and perplexed as to how children so young could get access to guns and commit such a violent crime, Sharletta let her family speak for her at the trial and during sentencing. She did not question the District Attorney's plan to use the boys 'as an example.'

It was not until 11 years after Casson's murder and several letters from by Raymond and Paul that Sharletta was able to begin to correspond

with them. As she started to compare the incarcerated boys to her son who was now reaching the same age as the offenders at the time of the crime, Sharletta realized she could not completely heal until she let the authorities know she wished her son's killers had a chance to redeem themselves.

Sharletta knew that, in particular, Raymond, who fired the bullet that killed her son, had changed. At arrest, Raymond could read at less than a third-grade level. Both of his parents had abandoned him, and he raised himself, with the help of grandparents. Over the years since the shooting, however, Sharletta has become aware that Raymond has changed. He has developed a faith in God, earned a GED, and kept a clean record in prison. Most importantly, he has expressed his remorse in his letters to Sharletta many times over the years since the shooting.

Sharletta has written to the Juvenile Clemency Board to request clemency for Raymond. Sharletta also founded the non-profit organization Red Cross Blue Shield Gang Prevention Inc. in 2003 to bring attention to restorative justice as a healing method that connects victims of violence to their offenders to achieve forgiveness and closure. In 2006, her home state of Colorado changed its law to allow life sentences for juveniles, but with the possibility of parole after 40 years. She is working on gathering support for a bill that would make this change in law retroactive to crimes committed since 1990.

Mona Schlautman

On October 8, 1992, 15-year-old Jeremy Drake was picked up by his 17-year-old friend, Jeremy

Herman, and a 19-year-old acquaintance, Christopher Masters. Herman's car stereo speakers had been stolen, and he believed that Drake knew where they were. Herman intended to use Masters' gun to scare Drake into revealing who had stolen the speakers, and Masters asked to come along for the ride. After driving around for several hours, Herman pulled into a park where Masters led Drake up a path and shot him. Herman pled guilty to kidnapping and was sentenced to life. Masters was also sentenced to life for the offense of first degree murder.

Mona Schlautman, Drake's mother, no longer remembers what she said when she testified at Herman's trial. She does, however, remember that she told him at his sentencing that she forgave him, and felt that her son would have wanted it that way. She recalls that "I was angry and I was upset, but just because of my own personal spiritual growth, I knew right away I needed to forgive – if not for him, for my own sake."

After the sentencing, Mona tried to contact Herman but had no success. Herman did the same but was unsuccessful until, through a private investigator, they connected and began exchanging letters around 2004. Mona met with Herman in 2005, and they have continued communicating by letters and phone calls ever since, allowing Mona to observe, firsthand, Herman's growth and progress. He went from a deeply troubled dropout to someone Mona regards as a well read and intelligent man.

A chance at parole – that is what Mona believes all youthful offenders should have. Though not all should get released, Mona was a supporter of Herman's release when his original life without parole sentence was recently reduced to 40 years in

prison. With credit for time served, Herman will likely be released within a year.

Reacting to the reduced sentence, Mona said she believed "He needed a chance at life. I couldn't discount what he had done, but he deserved a chance." Mona remarks that while nothing can bring her son back, no good is being done by keeping Herman in prison.

Her personal feelings match the science the Court acknowledged and relied upon in *Graham* about cognitive, emotional and even physical development of children. "Teenagers are not thinking with a full brain and make rash judgments without thinking," Mona observes. A mother of four, Mona has a heightened appreciation of the fact that children have the capacity to behave strangely as teenagers and differently from how they do later as adults.

Mona feels that everyone should be allowed a fair chance. Although she thinks it is good Herman went to prison, she is happy he is going to get out while still young enough to have a family. Criticizing the quality of rehabilitation programs in the prisons, Mona does not think prison prepares youth for successful reentry to society. She has seen them in custody "treated like animals."

To Mona, the best thing that Herman can do to make up for what he did is to come out and turn his life around. As a prisoner he remains a burden on taxpayers. He owes it to society to become a responsible, productive adult instead. "I'm glad he went to prison, I'm glad he did time and I'm glad he's getting out."

Linda White

"I forgive you, and God will, too." These were the last words Cathy White uttered before her teenage killers shot her three times in the back of the head. From that moment of tragedy, Cathy's mourning mother, Linda, began a journey from anger to forgiveness, together with her daughter's killer, to honor Cathy's memory.

Linda never imagined that she would become an ardent critic of the practice of sentencing youth to spend their lives in prison. She simply never confronted the issue until her 26-year-old daughter, Cathy, was kidnapped, raped, and killed by two teenaged boys. It was that tragic occurrence, on November 18, 1986, that set Linda along an unlikely path that led her to discover that youths who commit even the worst crimes can grow into responsible, mature adults capable of making real, positive impact in their communities. Linda knows this because she has watched her daughter's killer, Gary, become just such an adult.

Gary was only fifteen when he met his victim, two months pregnant at the time, at a gas station in Houston, near Cathy's home. Cathy had been moved by Gary's and his friend's plea for a ride out of town to help them escape abusive parents, and she had let the boys into her car. Almost immediately, the boys brandished a gun and forced Cathy to drive them toward Alvin. Before reaching their destination, they demanded Cathy pull over to the side of the road, where they raped her. The boys were high and drunk at the time, and in their compromised state, they decided to disable Cathy, (ostensibly to prevent her from calling the police) by shooting her in the leg. After the first shot, they reconsidered their

escape and reasoned that they would need to kill Cathy to eliminate the only witness to their crime. They shot her three times in the back of her head.

Linda did not learn of her daughter's murder for an excruciatingly long five days after Cathy had inexplicably disappeared from her home, during which time Gary and his friend were arrested on unrelated suspicions, confessed to the killing, and led police to Cathy's body. Gary's guilty plea and his 54-year prison sentence did little to assuage the deep sadness that Linda and the rest of her family—including Cathy's five-year-old daughter, Ami—felt. Nor did Linda feel that the sentence imposed was advancing the goals of the criminal justice system, notwithstanding the pro-prison rhetoric that she regularly encountered when speaking with others about the fate of Cathy's killers.

It was during this dark time in her life that the seeds of Linda's opposition to overly harsh prison sentences began to take root. While studying to be a death educator and grief counselor a year after Cathy's death, Linda found herself immersed in Hugo Adam Bedot's *Death Penalty in America*. By the time Linda completed the book, she knew that she simply had to confront the realities of the American penal system. She soon began conducting research into the theory behind prison sentences. Her research would eventually bring her into contact with prison inmates, where she would have the chance for the first time to directly interact with people who, like Gary, were facing the bleak prospect of spending most of their lives behind bars. Linda was increasingly drawn to the theory of restorative justice as she came to recognize that even the most hardened prisoners developed a sense of deep

remorse and desire to make amends for past misdeeds when given the chance.

The more Linda discovered, the more she engaged. In 1997, she began teaching upper level college courses in prison, and soon thereafter, she became involved in Bridges to Life, a mediation program allowing convicts and victims of others' crimes to open a dialogue, learn, and forgive. Linda came to know many prisoners who yearned for—and, to her mind, deserved—a second chance, and she grew to increasingly believe that it is deeply unjust and excessively punitive to deny convicts who have been fundamentally changed by their time in prison that opportunity.

Ironically, the convict who had set her along this path was "not on her radar screen" for many years. After pleading guilty and receiving his sentence, Gary had served out his first several years without much apparent personal change. He continued to get into trouble in prison (much as he had before his conviction) until several years into his sentence, when he was befriended by another inmate. As a result of the relationship that Gary developed with that inmate and his family, he began exhibiting remorse for his misconduct and eventually agreed to a meeting with Linda. Linda was eager for the meeting but wondered if she would be capable of showing Gary the same compassion that she had shown to countless other convicts with whom she had no personal history.

She need not have wondered. When Linda and Gary met, Linda found that he was a different person from the child who had callously raped and killed her daughter. Gary was a remorseful grown man who was desperately seeking both forgiveness and a chance to start making up for all of the hurt

that he had inflicted. Linda, true to her nature, was more than willing to grant Gary forgiveness, and he eventually earned the second chance he so desperately wanted. As of the filing of this brief, Gary has been out of prison on parole for just over one year. In that time, he has immersed himself in a new community; found and held a job; and begun working with drug and alcohol addicts at his church in a role in which his minister says he has made an incredible difference. Gary has kept himself away from any sign of trouble. He is in regular contact with Linda, and the two are planning to try to begin giving talks at Texas juvenile facilities. Gary never stops apologizing for the pain that he caused, and he regularly tells Linda that he wants to live a good, impactful life as a "memorial" to Cathy.

To Linda, Gary is a poster child for why life sentences are so unjust, especially for juveniles. From her research and experience, Linda knows that youths are both less able to fully appreciate the consequences of their actions and more likely to change in a relatively short period of time. To her, even the most horrific of crimes—the type to which her daughter fell victim—cannot justify locking someone away without giving them a second chance. Her daughter's murder, like so many others, resulted in large part from an extreme but forgivable failure by children to exercise the mature judgment that comes with age and experience. Cathy's teenaged killers, while drunk and high, made an impulsive decision to kidnap, rape, and murder her. Linda strongly believes that Gary and other youthful offenders need to be locked away so that they have the chance to contemplate their actions, to grow, and to mature. And by no means does she believe that convicts should be set free if they fail to show

remorse and simply do not demonstrate a desire to make amends. But Linda also knows that it is wrong to categorically deny youths the opportunity to earn a second chance.

Had Gary been sentenced to serve life without the possibility of parole, he would never have been able to become a living memorial to Cathy. To Linda, to keep Gary and the many, many others like him locked away for their whole lives would only compound the ugliness of crime with the ugliness of a draconian, unjust prison sentence. Linda does not want that, and she knows that Cathy would not have wanted that either. "Cathy," Linda says, "would be gratified to see Gary have a second chance."

Bill Pelke

On May 14, 1985, Ruth Pelke, a 78-year-old grandmother fondly known as Nana, was brutally murdered when four teenage girls broke into her home in search of money for the local arcade. Armed with the knowledge that Ruth gave Bible lessons in her home to children in the neighborhood, the girls arrived at her front door under the pretext of wanting a Bible lesson. As Ruth reached for her Bible teaching materials, one girl hit Ruth over the head with a vase. Paula Cooper, aged 15, then proceeded to stab Ruth to death – inflicting 33 stab wounds. Once they had killed Ruth, the girls absconded with a mere $10 and the keys to Ruth's old car.

Bill Pelke, Ruth's grandson, was a father of children of similar ages to the assailants. Shocked by this senseless murder, he found it particularly difficult to comprehend how these children could so grievously harm a defenseless older woman.

Prosecutors sought the death penalty for Paula and one other girl. In the cloud of shock and confusion, Bill's family didn't question the recommendation. At the time, Bill thought that the death sentence was appropriate because, as long as it was the law, "his grandmother deserved that her murderers should receive death." If it could not be used for the perpetrators of his grandmother's violent and unprovoked murder, he could not imagine a situation in which it would ever be appropriate.

However, one-and-a-half years after Ruth's death, and three-and-a-half months after Paula was sentenced to death, Bill realized that the death penalty was not the right response to the murder of a woman with a tremendous faith in God. He became convinced that his grandmother would have wanted him to show more compassion, even to her murderers. In fact, Bill was so certain of this that he wrote to Paula the next day and immediately began petitioning for a sentence for Paula that he felt his grandmother would approve. After three years of campaigning and gathering the support of two million petitioners, Paula's sentence was reduced to 60 years, with an early release after 30 years for good behavior.

During her time in prison, Bill has had regular contact with Paula – he wrote to her every 10 days while she was on Death Row. Although he wanted to visit Paula immediately, he was not permitted to do so until Thanksgiving of 1994 – eight years after Ruth's murder. He described the meeting as "wonderful." "Wonderful to have been able to face Paula, and not have the hate, anger and desire for revenge that it would have been so easy to have had, but to have the kind of love and

compassion that I feel God wants us to have for all of his creation."

Bill Pelke had not given any thought to the issue of sentencing juveniles to life in prison without parole prior to the death of his grandmother. But, his experience with Paula was life-changing. He now knows that life without parole is not the answer for juvenile defendants. He has seen Paula mature over the years; she has received a GED and a college degree and wants to help others who have suffered an ordeal like hers. She has expressed her remorse to Bill in her many letters and in their meetings. Bill knows of Paula's abusive childhood and is still saddened by the fact that neither of her parents was in court on the day that she was sentenced. Bill still remembers, however, that Paula's grandfather was in court, struggling to keep his composure as his grandchild was sentenced to death.

Bill's convictions led him to co-found the Journey of Hope, an organization of families of murder victims who oppose the death penalty. Bill has written and appeared in several books and magazines and speaks in a variety of forums. In large part because of his experience with Paula, Bill strongly believes that youths can be reformed, and that, accordingly, they should be eligible for a chance at parole. While the parole decision should be on a case-by-case basis, Bill believes sentencing a youth to life without parole denies these children a first chance, let alone a second chance, at life. He feels that the key to forgiveness is compassion – compassion for those people who made mistakes and have the ability to reform. Compassion for those people who made mistakes and have the ability to reform. Bill has extended an invitation to Paula to work with him at Journey of Hope upon her release

from prison. As a result of attaining her GED and college degree, Paula will be eligible for release in July 2013, after having served 28 years and two months – and Bill will be waiting to welcome her back to the world.

Aqeela Sherrills

January 10, 2012 marked the eighth anniversary of the day Aqeela Sherrills' teenaged son, Terrell, was murdered by another teenager at a party in an upscale Los Angeles neighborhood. April 28, 2012 marks the twentieth anniversary of a historical peace treaty that Aqeela brokered between two rival Los Angeles street gangs. These two anniversaries, represent sorrow and hope; they have shaped Aqeela's views against life imprisonment for youths, even for the teenager who ruthlessly murdered his son.

Home for winter break from studying theater arts at Humboldt State University, Terrell was shot in the back by a 17-year-old while speaking to one of his friends at a party. Terrell's killer was quickly identified through the street network but not arrested. Aqeela later shocked everyone when, in addressing the nation on the "America's Most Wanted" television show, he said he did not want Terrell's teenaged killer to spend the rest of his life in prison. Rather, Aqeela wanted to meet the killer and his parents to understand him and he wanted to be sure the killer received appropriate care while carrying out his sentence. Even as he pled for the killer – a 17-year-old gang member – to turn himself in, he reiterated to the police, to family and to friends that his primary concern was getting the killer the help that he needed to heal.

Aqeela had been opposed to life without parole for juveniles even before Terrell's death. Coming of age in the Watts neighborhood of south-central Los Angeles, he began working to end gang conflict as a young man. A one-time gang member himself, Aqeela knew where these violent youth came from. "My friends and I had been living under a set of unwritten rules. Most of us hadn't really understood what we were doing. We were just following them because if we didn't, there would be consequences." These "rules" about loyalty, love and revenge caused the smallest conflict to lead to the ultimate violence – violence that should have been preventable. Aqeela knew personally that "sexual, physical or psychological abuse," affects a youth's ability to cope because he had experienced all these himself. For Aqeela, the only way to confront adolescent criminal activity is to focus on healing those wounds and changing people's attitudes about adherence to those "rules."

Aqeela knows such change can be accomplished because he has done it himself. Aqeela was the driving force behind brokering a 1992 peace treaty between the Los Angeles Bloods and Crips street gangs. From this and other similar experiences, Aqeela has seen that youth can redeem themselves.

To Aqeela, a life sentence without the possibility of parole for a 17-year-old is unjust. Aqeela recognized that his son's killer, while having committed a heinous crime, is still a person who could contribute positively to his community. "The community cannot afford to lose another child. It is imperative that we give people, especially children, a second chance and the opportunity to redeem themselves."

That the killer was a minor at the time of Terrell's murder is important to Aqeela's opposing a lifetime prison sentence for him. He knows that youthful offenders have a much greater chance of turning their lives around and breaking their destructive patterns than adults do. Acknowledging science's latest findings that the brains of young people are still developing, Aqeela realizes that youths have something else on their side that adults do not: time. They have time to heal, time to address the root causes of their destructive behavior, and time to alter the patterns that caused them to commit murder.

Aqeela does not feel that he holds these beliefs alone: "Terrell speaks through me against life imprisonment for juveniles." And Terrell's voice has guided Aqeela to becoming the Regional Director of the Resources for Human Development California ("RHDC") which focuses on preventing violence by offering classes in life management skills, mentoring, victim services and community re-entry assistance for people leaving prison, and mental and holistic health services.

B. Victims Know Youth Can Reform.

Mary Johnson

"Who did he think he was that he could take my child's life? I hated him, truly hated him." Mary Johnson recalls her feelings when she first learned that 16-year-old Marlon Green (now known as Oshea Israel) had murdered her only child, 20-year-old Laramiun Byrd, on February 12, 1993 in Minneapolis, Minnesota. Oshea, a member of a teenage gang, got into a fight with Laramiun at a

house party, pulled a gun on Laramiun, and shot and killed him.

Mary attended every court appearance relating to her son's murder, and wanted nothing less than for Oshea to be "caged up like the animal he was" for the rest of his life. She even recalls Oshea turning to look at her in the court room and smiling as if to say "Yes, I killed your son. What are you going to do about it?" Mary's anger was further fueled when the judge lowered Oshea's first-degree murder charge to second-degree murder.

Oshea was tried as an adult, and sentenced to twenty-five-and-a half years.

Searching for answers for how to heal, Mary founded "From Death to Life," an organization dedicated to ending violence through healing and reconciliation between families of victims and perpetrators. Through From Death to Life, Mary counsels parents whose children have been killed, as well as families of murderers. In Mary's view, the families of the murderers are also victims, because "hurt is hurt, it doesn't matter what side you are on." Mary soon realized that her failure to forgive was "like a cancer that eats you from the inside," and that if she wished to heal, she needed to meet her son's killer.

Mary reached out to Oshea who agreed to meet her. But when the day of the visit came, half way up the ramp to Stillwater Prison, Mary was suddenly overcome with doubt, and told her support team that she could not do it. Physically and emotionally, Mary had to be pushed up the ramp into Stillwater Prison and toward her son's killer. But by the end of the meeting, she and Oshea hugged. Overwhelmed by emotion, Mary began to fall and it was Oshea who caught her. He then said

to her, "Ma'am, I believe you're gonna be the person to help me to cry." "Yes," Mary said, "I will be that person." Moments later she thought, "I just hugged the man who murdered my son," and a heavy burden lifted from her body along with all her negative emotions. For Mary, "the anger and bitterness was over. I just knew it. I had reached the point of total forgiveness."

Oshea was released on March 7, 2009 after serving sixteen years of his sentence. It was Mary's From Death to Life organization that hosted a homecoming celebration for Oshea and his family. And it was Mary who introduced Oshea to her landlord so he could invite Oshea to move in next door to her. Now Mary and Oshea not only share a porch, but a bond so strong that Mary considers Oshea to be her "spiritual son," and Oshea sees Mary as his second mother.

Even before Oshea was released from prison, the authorities at Stillwater Prison were so intrigued by the relationship between Mary and Oshea that they asked Mary to speak to the inmates at the prison about her experiences and her views on forgiveness. Since his release from prison, Oshea now joins Mary at these speaking engagements at Stillwater Prison. They also regularly travel around the nation speaking at various functions to a wide range of audiences, including the 2011 Wisconsin Restorative Justice Conference.

It is significant to Mary that, like Laramiun, Oshea was intelligent but fell in with the wrong crowd and was involved in drug dealing. A child of divorced parents, Oshea was torn between the well-disciplined path of his mother and minister step-father, and the urge to rebel to fit in with his father's side of the family. Mary believes this inner struggle

continued even when Oshea got to prison. But once he started meeting with Mary, he started the process of accepting responsibility for his actions, and forgiving himself. And, to Mary, that is what justice should focus on – giving the offender the chance to reform. She has come to believe juvenile offenders are "...all children. What does it achieve to lock them all up for their entire lives? If they don't have a chance to reform and heal, and to show others how to learn from their mistakes, there's no hope for anybody."

Today Mary is proud – proud of Oshea for his full time job at a recycling plant by day, and proud of his pursuit of a college degree by night. Mary asserts that her forgiving him does not pardon or diminish what he did, but it helps her move forward because she believes "people can change."

Melanie Washington

Damon Dowell, age 19, and Dante Corothors, age 17, were friends. Damon had "adopted" Dante "as a little brother" even though Dante was a member of the Bloods gang. Damon was not a member of any gang but he was intrigued by what gangs stood for and wanted to help young gang members from the Bloods and the Crips. He even tried to bring them together under a truce at one point. Yet, on December 26, 1995, without warning and in an effort to prove himself to his fellow gang members, Dante shot Damon in the back two times and then shot him in the face, killing him. Dante was sentenced to life without parole.

The heartbreak of losing her son was amplified for Damon's mother, Melanie Washington. She has already experienced more than her share of

violence. Sexually molested and raped when she was still very young, she saw gang and domestic violence tear apart her family and community. Her mother and sister were murdered at the hands of her stepfather when she was 10 years old. Melanie was a victim of her first husband's abuse for three and a half years until she found out that he had murdered his own mother. Finding the strength to leave that marriage, she remarried only for it to end in the murder of her second husband by his best friend just three years after their marriage. After all that, Damon's death was a tipping point which could have broken Melanie. Instead, she resolved to try to make a difference in the community that had caused her so much pain and loss.

Melanie founded the organization Mentoring – A Touch From Above ("MATFA"), which works with jailed youth, helping them take responsibility for their actions and then re-enter the community as responsible young men. MATFA serves boys and young men ages 10 to 25 who are incarcerated in juvenile detention centers and the Department of Juvenile Justice. It also serves youth in the school districts by providing education and support in an effort to prevent them from going into the juvenile justice system in the first place and helping them to make better choices for their futures. Among the offenders that Melanie is currently counseling is Dante. Melanie, through MATFA, works with youthful offenders to assist them in understanding that there is a way to say "I'm sorry" and move their lives forward.

Melanie has helped build up MATFA so that many young lives have been turned around. Graduates of the program are working at stable jobs and attending college. MATFA "graduates" have

become an asset rather than a threat to their communities.

Melanie knows first hand how difficult the path to reconciliation and forgiveness can be on both sides. Six months after Damon's death, Melanie wrote many letters to Dante in prison, but he refused her mail. She persevered for a few months more until Dante finally reached out to Melanie to ask why she insisted on writing him. Dante eventually agreed to an in person meeting with Melanie after seven years of written correspondence when he realized that her desire to meet and forgive was genuine. Today, Melanie and Dante are still in contact.

When Damon was first killed, Melanie had not focused on the appropriateness of a particular legal sentence, other than to know that she did not believe in the death penalty. However, through her work with MATFA and her experience with youthful offenders such as Dante, she now knows that juvenile life without parole is not the right answer for many youth who are convicted. Each case requires individual consideration and review. Those youth who show remorse and the willingness to succeed in prison deserve a second chance. Melanie has come to know personally that each case and each offender is different.

Azim Khamisa

Tariq Khamisa was a 20-year-old college student at San Diego State University with a caring family, a beautiful fiancé, a bright future, and a love for life. On the night of January 21, 1995, Tariq was delivering pizzas when he was robbed, shot and killed by 14-year-old Tony Hicks. Tony, then an 8th

grader in junior high school, killed Tariq on the orders of an older gang leader, simply because the gang was hungry and had no money.

Tony pled guilty to first degree murder, and was sentenced to 25 years to life in an adult prison.

Tariq was the only son of Azim Khamisa, a former investment banker who grew up in Kenya, was educated in England and later moved to the United States. After his son's death Azim was very angry, but his anger was not directed towards his son's 14 year old killer. In fact, Azim was able to forgive Tony for killing Tariq. Azim comments that, "from the onset, I saw victims on both ends of the gun. I will mourn Tariq's death for the rest of my life. Now, however, my grief has been transformed into a powerful commitment to change. Change is urgently needed in a society where children kill children."

Determined to honor his son, and his son's love for life, Azim established the Tariq Khamisa Foundation ("TKF Foundation"), which focuses on crime prevention, stopping youth violence and developing at risk youth into productive members of the community through education, mentorship and community service programs. Shortly after the TKF Foundation was established, Azim contacted Ples Felix, Tony's grandfather and guardian, and asked him to work with him at the TKF Foundation. Azim and Ples have served together on the board of the TKF Foundation for the past 15 years.

In addition to the many other youthful offenders that Azim has met through his work with the TKF Foundation, Azim has been in regular contact with Tony, who has since passed his GED in the 94th percentile and is working toward a degree in Child Psychology. Azim has invited Tony to come

and work with him and his grandfather at the TKF Foundation upon his release from prison, to "join in the quest to prevent other kids from going down the same path." Azim believes that his experience with Tony is indicative of the potential in other young offenders, remarking that "all offenders, even the most hardened, have something of value within them. We can turn these kids around."

An investment banker turned social worker, Azim devotes his time to speaking to audiences across the United States about forgiveness, restorative justice and teaching children the principles of non-violence, and, on a day-to-day basis, works on the outreach initiatives of the TKF Foundation, which include a mentoring program with school districts throughout San Diego County, and partnerships with organizations such as the City of San Diego Commission on Gang Prevention and Intervention, and Students Against Youth Violence at San Diego State University.

Tammi Smith

Robert Sellon was the beloved, good humored half-brother of Tammi Smith who would often play good-natured pranks on Tammi and her twin sister. So when 17-year-old twin brothers David and Michael Samel brutally murdered 18-year-old Robert on October 26, 1981, just four days after Tammi's 15th birthday, she was filled with hatred.

Stoned, drunk and looking to steal marijuana and cash, David and Michael set out to rob Robert. When Robert put up a fight, the two brothers strangled him with nunchucks and beat him to death with a hammer. At his trial, Michael pled guilty to second degree murder and was sentenced to 35 to 55

years in prison. Meanwhile, David's counsel believed that because Michael had pled guilty, David would likely receive a reduced sentence. Instead, this case not only proceeded to trial on first degree murder, but also resulted in a sentence of life in prison without parole for David.

Initially, Tammi was enraged by what these boys had done to Robert, and she hoped that David and Michael would be imprisoned for the rest of their lives for their crime. She had recurring nightmares about the attack, and prior to David being transferred from pre-trial detention to permanent incarceration, Tammi visited him to express her hatred of him face-to-face, and to curse him for destroying her family. But this did nothing to provide her closure.

In 2001, Tammi realized that Michael would soon be released from prison, and that there was a key unresolved question that prevented her from achieving closure: What kind of adults had David and Michael become in prison? Tammi reached out to Michael, and the three of them started to correspond. As Tammi learned more about David and Michael, she saw that they were no longer drug-addicted, naïve teenagers, but mature adult men who felt extreme remorse over the crime committed in their youth. "David has talked about how childish he was, and he will beat himself up over it," she says. David has even expressed to her "that if he could give his life to bring her half-brother back, he would."

Michael was released in 2009, after serving 27 years, but David remains in prison. Identical twins, the same victim, yet very different outcomes.

Tammi favors and will help to seek David's release. Tammi says that "he would be a better

person out than wasting his life just sitting in prison – he could give something back." Since being in prison, David has obtained a degree in horticulture, was studying for a law degree before the program was canceled, and works in the prison hospice system.

Tammi is not only seeking David's release but also opposes all juvenile life without parole: "It is just not right to put a teenager in prison for the rest of their lives thinking they are never going to change." She says David is not the same person now as he was as a teenager, and that he should not continue to be punished for the mistakes of his youth. It is clear to her that David would never commit a similar crime again.

Tammi thinks her brother Robert, who got into trouble as a youth for drugs himself, would have wanted a second chance for David. Tammi feels society is better served by releasing youthful offenders who have sufficiently demonstrated remorse for their crimes and who have applied themselves during their time in prison. She is inspired by David's commitment to using his time in prison to educate himself. She is gratified to hear David say that, should he ever be released, he wants to help youths who have been convicted of crimes. But that will wait because, almost 30 years after being convicted for killing Robert, David is still confined to prison and faces the possibility that he will continue to pay for his crime until he dies in prison.

Robert Hoelscher

When Robert Hoelscher was seven, his father was murdered by a troubled 17-year-old who lived in

his neighborhood. Robert's mother found her husband's body on the floor of the convenience store Robert's father managed. Robert's father had partially lost his hearing while serving in World War II, so he never heard his assailant coming. He was shot in the back. The teenage killer was quickly apprehended with the murder weapon and the money he stole. He was tried and sentenced to life in prison. He remains in prison today, more than fifty years later.

Robert and his five brothers and sisters were left without a father and, in many ways, the trauma that their mother experienced took her from them too. Robert's mother, though very strong for her children in the days after the murder, spent most of the rest of her life struggling with addiction to nicotine, alcohol and pain killers. She died of cancer at the age of 57. Robert's family never discussed his father's death or the feelings that event created. Not until well into his adulthood did Robert find himself retelling the story time and time again to support a cause he came to champion.

Robert has spent a decade working in the criminal justice system and with youths specifically. His work in this area began in 2001 when he joined the Innocence Project of New Orleans as a volunteer. In only one year, Robert's hard work and dedication earned him a promotion to be the organization's first executive director. He held this position from 2002 to 2005 when he returned to Austin to work at the University of Texas. Although it is no longer his full-time job, Robert has never stopped working on behalf of innocent prisoners. He remains deeply committed to efforts to reform criminal justice in this country and continues to volunteer. Now that the issue before the Court is whether offenders under

individuals whose criminal acts were committed under the misguided influence of youth."

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

10-9647, 10-9646

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Supreme Court of the United States

10-9647

KUNTRELL JACKSON,

Petitione

—v.—

(caption continued on inside cover)

BRIEF OF JEFFREY FAGAN, DEBORAH BASKIN, FRANK R. BAUMGARTNER, KATHERINE BECKETT, DONNA BISHOI ALFRED BLUMSTEIN, ROBERT BRAME, TODD R. CLEAR, SIMON A. COLE, PHILIP J. COOK, FRANCIS T. CULLEN, JOHN DILULIO, JR., KENNETH A. DODGE, JAMES ALAN FOX, DAVID GARLAND, MARIE GOTTSCHALK, DAVID A. GREEN, DAVID GREENBERG, CRAIG HANEY, BERNARD E. HARCOURT, KAREN HEIMER, DAVID S. KIRK, MARK A.R KLEIMAN, LAUREN J. KRIVO, AARON KUPCHIK, CHARIS E. KURBIN, JANET L. LAURITSEN, GLENN CARTMAN LOURY, TERRY A. MARONEY, TRACEY L. MEARES, EDWARI P. MULVEY, DANIEL NAGIN, ANDREW PAPACHRISTOS, RAYMOND PATERNOSTER, JOHN PFAFF, MICHAEL L. RADELET, RICHARD ROSENFELD, ROBERT J. SAMPSON CARLA SHEDD, SIMON I. SINGER, JONATHAN SIMON, MICHAEL TONRY, VALERIE WEST, JAMES Q. WILSON, CHRISTOPHER WINSHIP, FRANKLIN E. ZIMRING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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ON A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

10-9646

EVAN MILLER,

Petitioner,

—v.—

ALABAMA,

Respondent.

ON A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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INTEREST OF *AMICI CURIAE*

Amici curiae are forty-six academics who submit this Brief in support of Petitioners Evan Miller and Kuntrell Jackson.[1] All *amici* have an interest in, teach classes on, and/or have published peer-reviewed research in the fields of criminology and/or juvenile crime trends in the United States.

Amici write in support of the Petitioners in order to bring to the Court's attention certain data and other information relating to what proved to be a short-lived increase in juvenile crime that led to changes in the treatment of juveniles (i.e. persons under the age of 18) in many states' criminal justice systems. These changes resulted in increased exposure of juvenile offenders to the possibility of sentences of life without parole.

This Court held unconstitutional the execution of juvenile offenders in *Roper v. Simmons*, 543 U.S. 551 (2005), and prohibited sentences of life without parole for juveniles convicted of non-homicide offenses in *Graham v. Florida*, 130 S. Ct. 2011, 560 U.S. ___ (2010). The Court, however, has

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

not ruled on the issues presented in these cases, the constitutionality of sentences of life without parole for juveniles convicted of homicide offenses, including felony homicide.

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SUMMARY OF ARGUMENT

The spike in violent crime by juveniles in the late 1980s and early 1990s triggered widespread fears about the causes and extent of juvenile violence. Many states changed their laws regarding the transfer of juveniles to the adult criminal system in response to this increase in juvenile crime, subjecting juvenile offenders to sentencing regimes

that were originally conceived for adults, including sentences of life without parole.

The fears of a juvenile crime wave that prompted these changes became embodied in the notion of a "juvenile superpredator," which was reflected in academic and political discourse. Juvenile superpredators were characterized as ruthless sociopaths who lacked a moral conscience and were unconcerned about the consequences of their actions and undeterred by punishment.

However, the fear of an impending generation of superpredators proved to be unfounded. Empirical research that has analyzed the increase in violent crime during the early- to mid-1990s and its subsequent decline demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless. *Amici* have been unable to identify *any* scholarly research published in the last decade that provides support for the notion of the juvenile superpredator, and the scholar credited with originating that term has acknowledged that his characterizations and predictions were wrong; he is one of the *amici* who submit this brief.

In addition, prison sentences of life without parole, whether discretionary or mandatory, have not been shown to have a deterrent effect on juvenile crime, and the incarceration rates of juveniles pursuant to such sentencing policies demonstrate no causal relationship to the significant reduction in juvenile violent crime since the mid-1990s. There is

no empirical basis for any concern that declaring unconstitutional sentences of life without parole for juvenile offenders would result in an increase in violent juvenile crime.

ARGUMENT

I. Background of the Notion of the Juvenile Superpredator

From the late 1980s to the early 1990s, homicide rates in the United States spiked, taking on the characteristics of an epidemic with a distinct onset and peak. In 1984, the homicide rate in the United States was 7.9 per 100,000 U.S. residents.[2] This rate increased to a peak of 9.8 per 100,000 in 1991.[3]

Juveniles (aged 14-17) and young adults (18-24) accounted for the entire increase in the homicide rate, as shown in Figure 1 below. The homicide rate for juveniles increased most dramatically, from approximately 10 per 100,000 in 1985 to a peak of approximately 30 per 100,000 in 1993.

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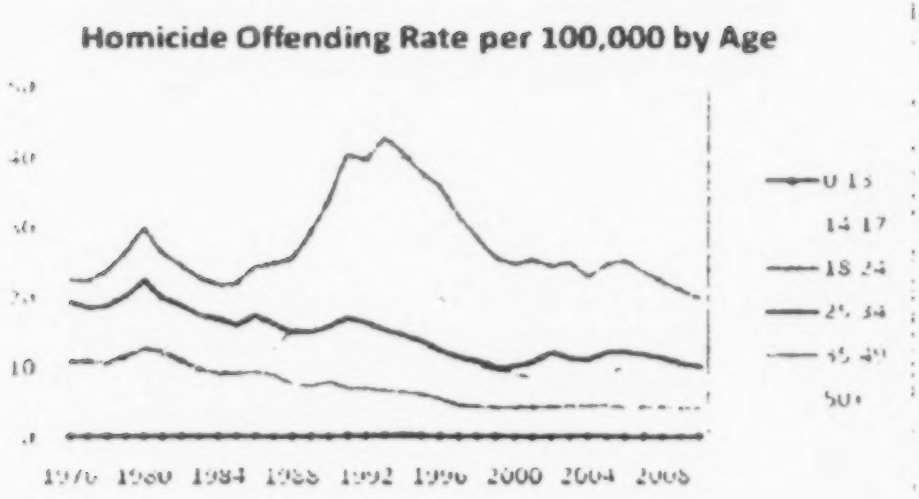
[2] Alexia Cooper & Erica L. Smith, Bureau of Just. Stat., U.S. Dep't of Just., NCJ 236018, Homicide Trends in the United States, 1980-2008 2 (2011), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2221.

[3] *Id.*

Figure 1[4]



As a result, while juveniles constituted less than 10% of all male homicide offenders in 1985, the proportion had doubled to nearly 20% by 1993, as shown in Figure 2 below.

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[4] U.S. Dep't of Just., Fiscal Years 2000–2005 Strategic Plan, Appendix D: Key Facts on Crime and Justice (2000), *available at* http://www.justice.gov/archive/mps/strategic2000_2005/tocpdf.htm. The graph in Figure 1 has been updated by Professor James Alan Fox of Northeastern University using the same Bureau of Justice Statistics to include data through 2010.

Figure 2[5]

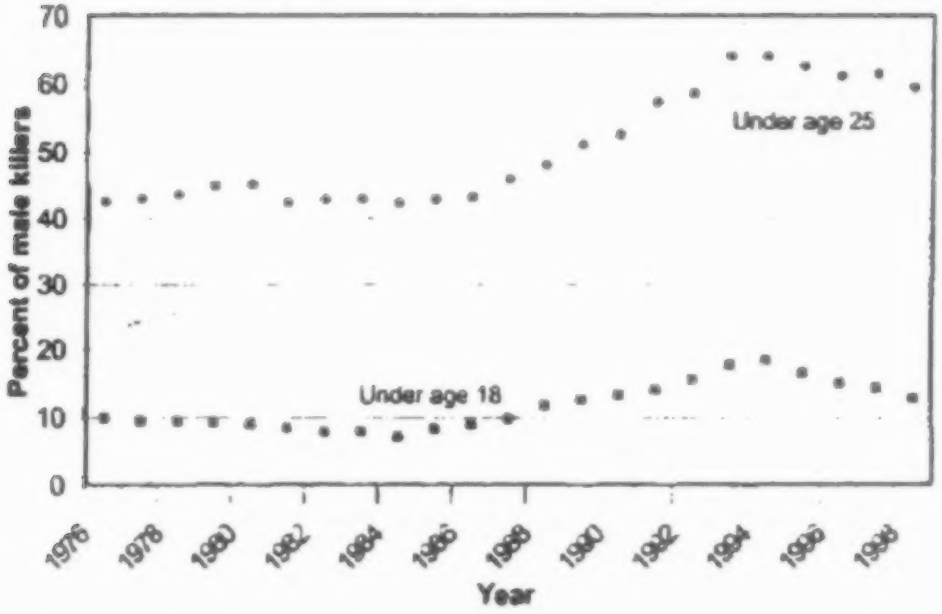

FIG. 8.—Age distribution of suspected male killers, 1976–98. Sources: ICPSR (2001a). See appendix for details.

Studies by the National Research Council and Institute of Medicine and by criminologists have attributed the growth in juvenile violence in the early 1990s to several period-specific factors, including (i) increased gang participation by youths, (ii) involvement of adolescents in violent drug dealing organizations, and (iii) a general increase in lethal violence, especially gun violence.[6] However, in

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[5] Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 Crime & Just. 1, 15 (2002).

[6] Nat'l Res. Council and Inst. of Med., Juvenile Crime, Juvenile Justice 93–94 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell, eds., 2001) (gangs); Alfred Blumstein,

response to the increase in juvenile homicide, certain social scientists and commentators argued that changes in the culture and social structure signaled a fundamental transformation in child development that corroded empathy and morality, spawning a new generation of remorseless youths who were feared to be "muggers, killers, and thieves."[7] John DiIulio, Jr., then a professor of Politics and Public Affairs at Princeton University, and one of the *amici* who are submitting this brief, is widely credited with having coined the term "superpredator" in the mid-1990s to describe these youths.[8] The term appeared in numerous articles and books written by Professor DiIulio and others during that period.[9]

Youth Guns and Violent Crime, 12 The Future of Children 39, 44–49 (2002) (drugs and guns); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10 (1995) (guns and drugs).

[7] William J. Bennett, John J. DiIulio, Jr., & John P. Walters, Body Count: Moral Poverty...And How To Win America's War Against Crime and Drugs 26 (Simon & Schuster 1996) (quoting James Q. Wilson, *Crime and Public Policy*, in Wilson and Petersilia, *Crime*, at 507).

[8] *See* Lara A. Bazelon, *Exploding The Superpredator Myth: Why Infancy Is The Preadolescent's Best Defense In Juvenile Court*, 75 N.Y.U. L. Rev. 159, 165 n.21 (2000).

[9] *See* John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, City Journal, Spring 1996 (referring to "super-predators"); Gene Koprowski, *The Rise of the Teen Super-Predator*, Washington Times, Oct. 23, 1996, at A17; Suzanne Fields, *The Super-Predator*, Washington Times, Oct. 17, 1996, at A23 ("The super-predator is upon us."); John DiIulio, *Defining Criminality Up*, Wall St. J., July 3, 1996, at A10

This literature described juvenile superpredators as:

> Radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience. They perceive hardly any relationship between doing right (or wrong) now and being rewarded (or punished) for it later. To these mean-street youngsters, the words "right" and "wrong" have no fixed moral meaning.[10]

("[The victim's] murderer exemplifies the growing threat of juvenile super-predators who maim and murder without remorse or fear."); Peter Annin, *Superpredators Arrive: Should We Cage the New Breed of Vicious Kids?*, Newsweek, Jan. 22, 1996, at 57; John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 23 ("On the horizon...are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons...They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.")

[10] Bennett et al., *supra* note 7, at 27.

In 1995, Professor DiIulio predicted that the number of juveniles in custody would increase three-fold in the coming years[11] and that, by 2010, there would be "an estimated 270,000 more young predators on the streets than in 1990."[12] Criminologist James Fox observed, "[u]nless we act today, we're going to have a bloodbath when these kids grow up."[13]

The notion of juvenile superpredators gained popularity beyond criminologists and social commentators and entered and was reified in political rhetoric.[14] "This metaphor was successful

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[11] DiIulio, *The Coming of the Super-Predators*, *supra* note 9 ("Between 1985 and 1991, the number of juveniles in custody increased from 49,000 to nearly 58,000. By my estimate, we will probably need to incarcerate at least 150,000 juvenile criminals in the years just ahead.").

[12] DiIulio, *My Black Crime Problem*, *supra* note 9.

[13] Laurie Garrett, *Murder By Teens Has Soared Since '85*, N.Y. Newsday, Feb. 18, 1995.

[14] *See e.g.*, Juvenile Justice and Delinquency Prevention Act, Hearing Before the House Comm. on Economic and Educational Opportunities, Subcommittee on Childhood, Youth and Families, 104th Cong. 90 (1996) (statement of Hon. Bill McCollum, Chairman, Subcommittee on Crime, H. Judiciary Comm.) ("[B]race yourself for the coming generation of 'super-predators.'"); Bruce Daniels, *Juvenile Justice a 'Top Priority,'* Albuquerque Journal, Oct. 8, 1996, at C3 (Senator Pete Domenici, who introduced the Juvenile Justice Modernization Act, stated one of the bill's "key principles" was to "[u]pdat[e] laws to deal with the 'superpredator,' the increasingly violent juvenile criminal") Franklin Zimring, *Crying Wolf Over Teen Demons: Crime: Projecting A New Crime Wave Serves Politicians, Even If It*

in catalyzing policymakers and the public because it readily accessed the public's hidden stereotype of the violent youth as someone who is dangerous, living in a hopeless situation, and not worthy of empathy or support."[15]

Throughout the 1990s, state legislatures took action in an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders, which created "a looming sense of danger that a 'superpredator' youthful offender is at large."[16] Between 1992 and 1999, nearly every state passed legislation that expanded the treatment of juveniles as adults for purposes of sentencing and punishment:[17]

Has No Basis In Reality, Los Angeles Times, Aug. 19, 1996, at 5 ("Bob Dole injected both the term 'superpredators' and alarming projections about 2010 into the presidential campaign.").

[15] Kenneth A. Dodge, *Framing Public Policy and Prevention of Chronic Violence in American Youth*, 63 Am. Psychologist, 573, 576 (2008).

[16] Jarod K. Hofacket, *Justice or Vengeance: How Young is Too Young for a Child to Be Tried and Punished as an Adult?*, 34 Tex. Tech. L. Rev. 159, 164 (2002).

[17] *See* Jessica Short & Christy Sharp, Child Welfare League of Am., Disproportionate Minority Contact in the Juvenile Justice System 7 (2005), *available at* https://www.ncjrs.gov/App/publications/Abstract.aspx?id=235885 ("Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation.").

- Between 1992 and 1995, forty-eight states and the District of Columbia made substantive changes to their laws affecting juveniles who committed violent or serious crimes.[18]

- Between 1992 and 1995, legislatures in thirteen states and the District of Columbia adopted or modified statutes that imposed mandatory minimum periods of incarceration for juveniles convicted of certain violent or serious crimes.[19]

- Between 1992 and 1997, forty-five states adopted or modified laws that facilitated the prosecution of juveniles as adults in criminal court.[20]

- By 1999, the majority of states had adopted provisions imposing mandatory transfer of juvenile cases to adult criminal proceedings for certain serious offenses.[21] These changes

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[18] Patricia Torbet, et al., Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., State Responses to Serious and Violent Juvenile Crime xv (1996), *available at* www.ncjrs.gov/pdffiles/statresp.pdf.

[19] *Id.*

[20] *See* Howard N. Snyder & Melissa Sickmund, Nat'l Center for Juv. Just., U.S. Dep't of Just., Juvenile Offenders and Victims: 2006 National Report 96 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/.

[21] *See* Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9, 13 (2008).

included lowering the age of eligibility for prosecution and sentencing in criminal court to 13 years in New York, and as young as 10 elsewhere.[22]

In addition, numerous bills were introduced in Congress to address juvenile crime, including one named the Violent Youth Predator Act of 1996.[23] Although the proposed federal legislation was not adopted, the state laws enacted during the 1990s

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[22] *See* Patricia Griffin, Patricia Torbet, & Linda Szymanski, Nat'l Center for Juv. Just., U.S. Dep't of Just., NCJ 1072836, Trying Juveniles in Criminal Court: An Analysis of State Transfer Provisions, 14-15 (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf (table listing the minimum age and offense for which a juvenile can be transferred to criminal court in every state as of 1997); *see also* Snyder & Sickmund, *supra* 20, at 114 (updated figure with minimum transfer age as of 2004).

[23] *See e.g.*, Juvenile Justice and Delinquency Prevention Act of 1996, S. 1952, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, S. 1991, 104th Cong. (1996); Violent and Repeat Juvenile Offender Reform Act of 1996, S. 1854, 104th Cong. (1996); Balanced Juvenile Justice and Crime Prevention Act of 1996, H.R. 3445, 104th Cong. (1996); Violent and Hard-Core Juvenile Offender Reform Act of 1996, H.R. 3494, 104th Cong. (1996); Violent Youth Predator Act of 1996, H.R. 3565, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, H.R. 3698, 104th Cong. (1996); Juvenile Crime Control and Delinquency Prevention Act of 1996, H.R. 3876 104th Cong. (1996); Juvenile Crime Prevention and Reform Act of 1995, S. 1036, 104th Cong. (1995); Violent and Hard-Core Juvenile Offender Reform Act of 1995, S. 1245, 104th Cong. (1995).

greatly expanded the imposition on juveniles of punishments previously reserved for adults.[24]

II. Scientific Evidence and Empirical Data Invalidate the Juvenile Superpredator Myth.

The prediction of a juvenile superpredator epidemic turned out to be wrong; in fact, there was no superpredator generation. [25] Professor DiIulio,

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[24] During the same era, zero-tolerance policies were implemented in many public schools, pursuant to which the first offense for weapon-carrying and other infractions was met with immediate expulsion from schools. No scientific evidence has found that zero-tolerance policies or school suspension policies lead to decreases in youth violence. *See* Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* Policy Research Report #SRS2 August, 2000. Other effects of the superpredator myth included the largest expansion in history in the U.S. prison population, which increased by more than one million between 1980 and 2000. *See* Sarah Lawrence & Jeremy Travis, *The New Landscape of Imprisonment: Mapping America's Prison Expansion* 1 Research Report of the Urban Institute, Washington D.C. (2004).

[25] The methodologies used in predicting the coming of a generation of superpredators have been criticized. *See generally* James C. Howell, Preventing and Reducing Juvenile Delinquency: A Comprehensive Framework 3–16 (2d ed. 2009); Franklin E. Zimring, American Youth Violence, 61–63 (Oxford University Press 1998); Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998) (challenging predictions of a "coming storm" of juvenile superpredators as distortion of statistics and "fundamentally unscientific" guesswork); *see also* Franklin E. Zimring, American Youth Violence (critiquing the use of a temporal spike in youth violence to predict future trends).

the original proponent of the juvenile superpredator notion and a signatory to this brief, has repudiated the idea and "expressed regret, acknowledging that the prediction was never fulfilled."[26]

Although the myth of a juvenile superpredator influenced legislation and policy, it was not substantiated by scientific evidence about how children develop. The popular myth suggested that all chronically antisocial youths were hopelessly defective—perhaps even genetically so. Molecular genetic studies, though, have revealed that genes account for very little of the variation in violent behavior, except when interacting with

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[26] Professor DiIulio has noted that the explicit conclusion of his original analysis even at the time was that "[l]ong prison terms would not deter" the most violent juveniles, and that the proper remedy was more faith-based anti-crime efforts (i.e. "build churches, not jails") as the best solution. *See* John J. DiIulio, Jr., *Rethinking Crime—Again*, Democracy Journal, Spring 2010, at 46, 52–53; *see also* Rachel Aviv, *Annals of Justice: No Remorse: Should a Teen-Ager Be Given a Life Sentence?*, The New Yorker, Jan. 2, 2012, at 57; *see also* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19. Professor James Fox, who urged that Professor DiIulio's predictions should drive changes in sentencing laws, also has repudiated the notion of the superprdeator and is a signatory to this brief. *See* James Alan Fox, *A Too-Harsh Law on Juvenile Murder*, The Boston Globe, Jan. 25, 2007, at A11 ("It's time to rethink our rigid juvenile murder law...").

environmental experiences such as physical maltreatment.[27]

Another aspect of the juvenile superpredator myth was the belief that antisocial youths prowl in "wolfpacks" and the superpredator exercises a contagious influence on unsuspecting peers, with the implication that he should be quarantined for life. However, a study of juvenile gang members shows that, when juvenile gang members are compared to non-gang member juveniles, gang members only have higher rates of delinquent behavior while they are gang members; juvenile gang members did not have higher rates of delinquent behavior before entering a gang or after they left a gang.[28] Also embedded in the juvenile superpredator notion was the belief that the antisocial youth who sets out on a

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[27] Avshalom Caspi, et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*. 297 Sci. 851 (2002).

[28] Terence P. Thornberry, et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 Crime and Delinq. 55–87 (1993) (noting that juveniles' rates of delinquent behavior increased substantially upon entering a gang and then declined significantly once they left a gang). Data do show that juveniles tend, when around peers, to act in ways that differ from how they would act alone. *See* Jason Chien, Dustin Albert, Lia O'Brien, Kaitlyn Uckert & Laurence Steinberg, *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 Developmental Sci. F1 (March 2011). The data do not, however, show that the presence of individual, highly deviant youth in those peer groups results in juveniles having higher rates of delinquent behavior even after leaving that group.

deviant path cannot change. Yet research has shown that most antisocial youths outgrow their deviant behavior through the support of specific environmental impacts such as marriage and employment.[29] Randomized controlled trials of systematic interventions for high-risk youths have also demonstrated conclusively that the trajectory of antisocial development can be interrupted.[30]

Moreover, empirical data analyzing crime and arrest rates also show that the juvenile superpredator was a myth. Beginning in the mid-1990s, violent juvenile crime dropped and continued to decrease through the present. The rate at which juveniles committed homicides fell dramatically, so

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[29] *See* Magda Stouthamer-Loeber et al., *Desistance From Persistent Serious Delinquency in the Transition to Adulthood* 16 Development and Psychopathology 891 (2004); *see also* Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 Criminology 301, 334 (2003) (concluding that there are important differences in adult criminal trajectories that cannot be predicted from childhood); Robert J. Sampson & John H. Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 625 (1990) (showing both incremental and abrupt change in delinquent behavior when youths are exposed to conventional social activities of stable employment and marriage).

[30] *See* Conduct Problems Research Prevention Group, *The Effects of the Fast Track Preventive Intervention on the Development of Conduct Disorder Across Childhood*, 82 Child Dev. 331 (2011); Scott W. Henggeler et al., Multisystemic Treatment of Antisocial Behavior in Children and Adolescents (1998).

that by 2000, the rate had stabilized at around 9.5 per 100,000, below the 1985 level, as shown in Figure 3.[31] Similarly, the average age of homicide offenders, which had dropped from 29.6 years in 1980 to 26.4 years in 1994, rose to 28.8 years in 2008.[32] According to the National Crime Victimization Survey[33] data, after the mid-1990s, the rate of all serious violent juvenile offending, including homicide, as of the mid-1990s was comparable to that of the prior generation.[34]

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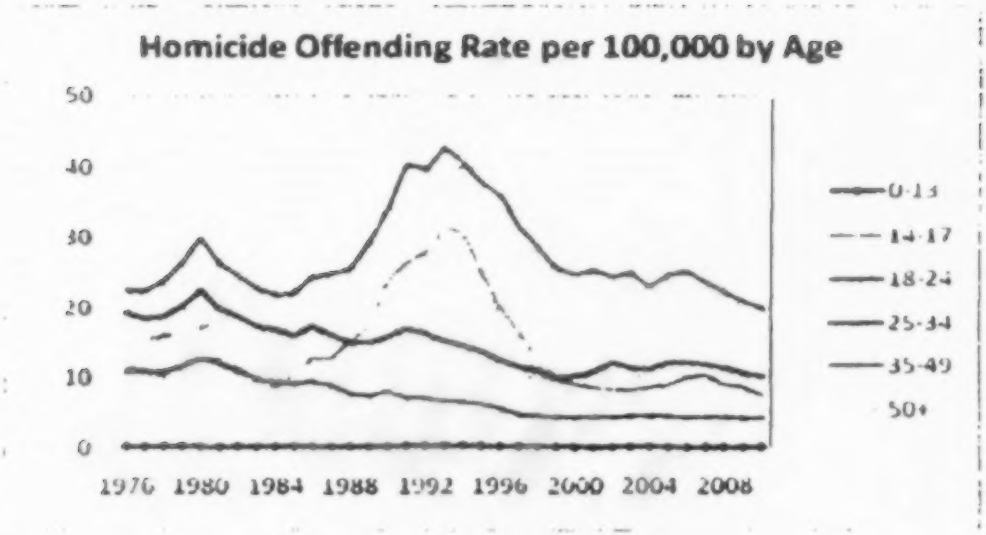
[31] Cooper & Smith, *supra* note 2, at 4.

[32] *Id.* at 5.

[33] NCVS data is collected directly from victims, which means it captures a greater percentage of offending behavior than can be found in police reports; however, it relies on victims to assess the age of offenders. *See* James P. Lynch, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 191052, Trends in Juvenile Violent Offending: An Analysis of Victim Survey Data 3 (2002), *available at* www.ncjrs.gov/pdffiles1/ojjdp/191052.pdf.

[34] Shay Bilchik, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 178993, Challenging the Myths 2 (2000), *available at* www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

Figure 3[35]



A. Arrest Rates Declined After 1994.

The decrease in juvenile violent crime rates was accompanied by a similar drop in juvenile arrest rates.[36] **The number of juveniles arrested for violent crimes, which had increased significantly during the late 1980s and early 1990s, fell by nearly 50% between 1994 and 2009 to its lowest levels since**

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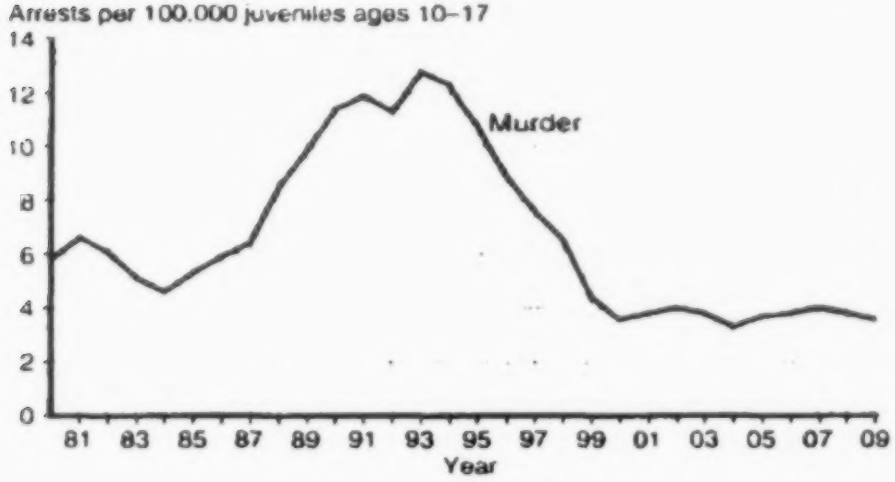
[35] Cooper & Smith, *supra* note 2, at 4. This graph has been updated by Professor James Alan Fox of Northeastern University using the same Bureau of Justice Statistics to include data through 2010.

[36] Arrest rates generally produce low estimates of offending because many crimes are not reported and many crimes remain unsolved. Furthermore, to the extent that race or gender affect the probability of being arrested, certain groups may be over- or underrepresented. *See* Lynch, *supra* note 33, at 3.

1980.[37] The juvenile arrest rate for murder declined even more dramatically, as shown in Figure 4. Indeed, between just 1992 and 1995 more juveniles were arrested for murder than in the ten years from 2000 through 2009, a period during which the arrest rate remained stable and historically low.[38]

Figure 4[39]



The temporary increase in the early 1990s and subsequent decrease since the mid-1990s in juvenile

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[37] *See* Charles Puzzanchera & Benjamin Adams, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 191052, Juvenile Arrests 2009 8 (2011), *available at* www.ojjdp.gov/pubs/236477.pdf.

[38] *Id.* at 9.

[39] *Id.* at 8

arrests for violent crimes was consistent with the trends for all age groups.[40]

B. The Increase and Decline in Juvenile Homicides Occurred Across Demographic Groups Throughout the United States.

The increase and subsequent decline in juvenile homicides was not specific to any demographic group. The homicide arrest rate for both white and black teenagers peaked in 1994 and then fell through the year 2000.[41] In addition, homicide arrest rates for both males and females have dropped over 65% from their respective peaks in the mid-1990s and are now below the levels of the early 1980s.[42]

The rise and fall of homicide rates took place nationwide. For example, the fifteen counties (located across the country) with the highest homicide rates for African-American teenagers and young adults in the mid-1980s all experienced a sharp increase in homicide rates for this group by

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[40] Bilchik, *supra* note 34, at 3.

[41] Puzzanchera & Adams, *supra* note 37, at 9. Juvenile arrest rates for all violent crimes similarly increased significantly across racial groups in the late 1980s and early 1990s and then experienced a decline of over 40% by 2009. *Id.* at 8.

[42] *Id.*

the early 1990s; most of these counties experienced declines in homicide rates by 1998.[43]

C. Juvenile Crime Rates Have Been Independent of Juvenile Population Trends.

The above-described trends in juvenile violent crime occurred independently of the changes in the overall juvenile population. Changes in the size and racial composition of the juvenile population were an essential argument in the juvenile superpredator forecasts.[44] Despite a growth in the number of youths, the juvenile violent crime rate has declined since the mid-1990s. The juvenile crime rates and arrest rates increased from 1987 to 1994, a period of slow juvenile population growth; yet, when the juvenile population increased significantly between 1994 and 1997, crime and arrests declined,[45] providing further empirical support that a generation of juvenile superpredators did not exist. Moreover, the share of the nationwide juvenile population confined in correctional custody declined by 24 percent between 1997 and 2007, from 256 of

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[43] Cook & Laub, *supra* note 5, at 18. Counties examined in this study were located in the following geographically diverse states: New York, California, Michigan, Maryland, Pennsylvania, Louisiana, Texas, Missouri, Florida, Georgia, Tennessee, Ohio, as well as the District of Columbia.

[44] *See* Howell, *supra* 26, at 5.

[45] Bilchik, *supra* note 34, at 6.

every 100,000 to 194 out of 100,000.[46] Similarly, the number of new admissions of juveniles to state prisons, which had peaked at over 7,000 in 1996, decreased to just over 4,000 by 2004[47] and has further shrunk since then.[48]

D. The Behavior of the Cohort of Purported Superpredators After the Mid-1990s Was Similar to Previous and Subsequent Generations.

Data show not only that juvenile violent crime rates declined, but also that the purported generation of juvenile superpredators behaved similarly to the generations that preceded and followed it.[49]

To assess the behavior of this cohort, researchers have compared the victimization rates of persons who were juveniles in the early 1990s to those who were juveniles before and after that

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[46] Richard A. Mendel, Annie E. Casey Foundation, No Place for Kids: The Case for Reducing Juvenile Incarceration 26 (2011), *available at* http://www.aecf.org/OurWork/JuvenileJustice/~/media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

[47] Snyder & Sickmund, *supra* note 20, at 237.

[48] *See* Heather C. West & William J. Sabol, Bureau of Just. Stat., U.S. Dep't of Just., NCJ 225619, Prison Inmates at Midyear 2008- Statistical Tables 20 (2009), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf.

[49] Cook & Laub, *supra* note 5, at 21.

period.[50] In particular, the homicide-victimization rates of black males born in 1969, 1974, 1977, and 1981 were compared to the victimization rate for the same age groups prior to the period of increased crime.[51] As shown in Figure 5, this analysis reveals that each group experienced elevated victimization rates during the era of higher juvenile crime, but that by 1998 the rate for each group decreased to the lower levels previously experienced by those born in 1969.

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[50] *Id.* at 24. Victimization rates were used because they have been highly correlated with offender rates.

[51] *Id.*

Figure 5[52]

FIG. 10 – Ratio of homicide victimization rates to pre-epidemic base rate (1976–84), four birth cohorts of black males. Sources: ICPSR (2001a–f); CDC (2001a, c). See appendix for details.

III. The Absence of a Generation of Superpredators Is Not Due to an Incarceration Effect or Deterrent Effect.

The fear of a generation of superpredators has not been borne out, but the laws that were passed in the wake of the increase in temporary juvenile crime that led to the rise of the juvenile superpredator myth continue to exist. Any argument that the harsher criminal penalties for juveniles deterred or incarcerated these purported superpredators is unpersuasive in light of the available research data.

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[52] *Id.* at 25.

A. The Decline in Juvenile Crime Was Not Due to an Incarceration Effect.

Empirical studies show that the legislative changes undertaken by certain states were not causally responsible for the decline in juvenile homicide rates. While the decline in juvenile crime occurred on a national scale, those states with the greatest decrease in juvenile confinement rates between 1997 and 2007 saw a slightly greater decline in juvenile violent crime rates than the national average.[53] There were no differences in states with and without statutes authorizing sentences of life without parole for juveniles, or in states that transferred everyone over the age of sixteen to the jurisdiction of criminal court versus those states that transferred youths more selectively. For example, between 1997 and 2007, Texas greatly increased its incarcerated juvenile population while California decreased its incarcerated juvenile population, yet the rates of juvenile crime in both states were remarkably similar.[54] In 2007, changes in Texas laws cut its incarcerated juvenile population by half.[55] Neither the state's overall crime rate nor the number of juvenile arrests has since increased.[56]

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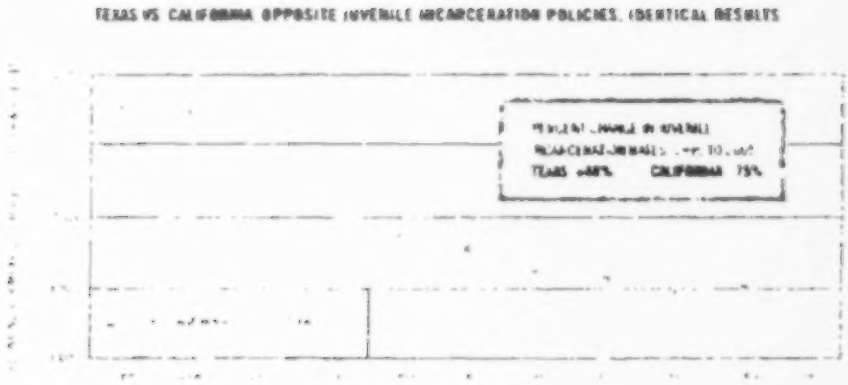
[53] Mendel, *supra* note 46, at 26.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 27.

Figure 6[57]



Similarly, a study of the effects of New York's Juvenile Offender Law on the rate of serious juvenile crime found minimal impact. New York's legislation, which was enacted in 1978, lowered the age of criminal court jurisdiction to thirteen for murder and to fourteen for rape, robbery, assault, and violent categories of burglary. The study analyzed juvenile arrest rates in New York for the four years prior to the enactment of the law and the six years after. It compared these rates with those for control groups of thirteen- and fourteen-year-olds in Philadelphia and with slightly older offenders in New York.[58] The study found that the change in law

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[57] *Id.*

[58] David McDowall & Simon I. Singer, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*. 22 Law and Soc'y Rev. 521 (1988). While arrest rates are an imperfect measurement of crime rates, they are nonetheless a strong indicator of crime rates. *See id.* at 528. ("The advantage of the arrest data is that they provide age-specific information on crime patterns. . .

had no effect on the levels of serious juvenile crime.[59] A study of the deterrent effect of an Idaho statute enacted in 1981, which required that juveniles charged with certain serious crimes be tried as adults, also found no impact on the arrest rates between five years before and five years after the passage of the law.[60]

The rate at which juveniles were incarcerated for life without the possibility of parole in different states bore no correlation to the rise and fall in juvenile homicide rates during the late 1980s and early 1990s, which was consistent across the states,

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Time series designs can tolerate some measurement bias, as long as this bias does not itself change at the intervention point."); *see also* McGowan, et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*, 32 Am. J. Prev. Med. S7, S19 (2007) ("Nevertheless, arrest rates are among the best available and most commonly used indicators of crime, and thus the best available outcome for assessment in this review.").

[59] McDowall & Singer, *supra* note 58.

[60] Eric L. Jensen and Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime and Delinq. 96 (1994); *see also* James Alan Fox, *Abolish life without parole in Mass.*, Boston.Com, Sept. 21, 2011, *available at* http://boston.com/community/blogs/crime_punishment/2011/09/abolish_juvenile_life_without_p.htm (analysis of the 1996 Massachusetts statute that made life without parole mandatory for all juveniles 14 and older convicted of first degree murder showing no subsequent impact on juvenile homicide rates).

including Alabama and Arkansas. States with large numbers of juveniles incarcerated for life without parole did not see their homicide offense rates decline sooner, faster, or to lower levels than did the states without significant numbers of juveniles sentenced to life without parole.[61] Pennsylvania and Michigan, with relatively higher proportions of juveniles serving sentences of life without parole, experienced trends similar to the rest of the country, as seen in Figures 7 and 8.

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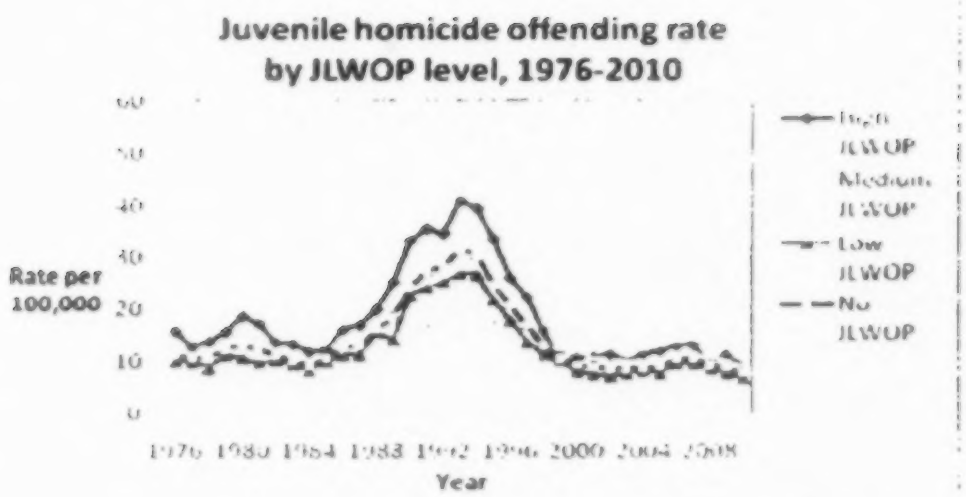
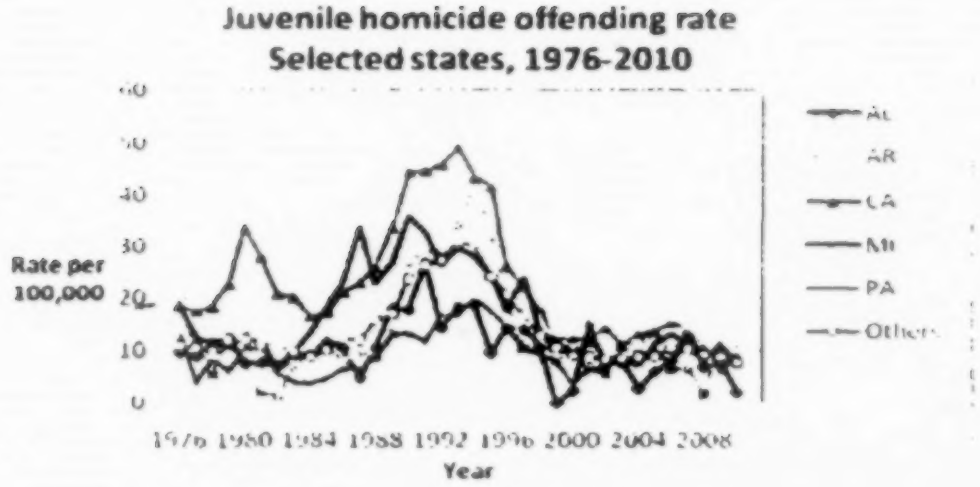
[61] "High JLWOP" is defined as more than 50 persons serving a juvenile life without parole sentence, "medium JLWOP" is defined as 25–49 persons serving a juvenile life without parole sentence, "low JLWOP" is defined as fewer than 25 persons serving a juvenile life without parole sentence, and "no JLWOP" means no person is serving a juvenile life without parole sentence. These categories were defined by Professor James Alan Fox.

Figure 7[62]



[62] Source of data: Juvenile homicide counts represent the estimated number of homicide perpetrators, ages 14–17, based on the Supplementary Homicide Reports with multiple imputation for missing data and therefore represent estimates. Population data are from the U.S. Bureau of the Census estimates of resident population by state, age, race, and sex. These data were then converted into Figures 7 and 8 by Professor James Fox at Northeastern University.

Figure 8



B. The Decline in Juvenile Crime Was Not Due to a Deterrent Effect.

The fact that juvenile homicide rates were not affected by the rate at which states imposed sentences of life without parole on juveniles is not surprising given that research shows that transferring juveniles to the jurisdiction of criminal courts or lowering the age of majority has no discernable deterrent effect.[63] Juveniles experience no spike in crime rate once they turn eighteen, and increased criminal sanctions have no significant correlation with this result.[64] In fact, there is little

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[63] David S. Lee & Justin McCrary, *Crime Punishment, and Myopia*, 29 (NBER Working Paper Series, Working Paper 11491, June 2005).

[64] *Id.*; *see* McGowan, *supra* note 58, at S15 ("On the basis of strong evidence that juveniles transferred to the adult

evidence that the prospect of longer sentences has a significant deterrent effect on adolescents.[65] It thus appears that legal changes that increased the rate at which juveniles were transferred to the regular criminal court system did not contribute to the decline of the juvenile homicide rate.

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justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system, the Task Force on Community Preventive Services concludes that strengthened transfer policies are harmful for those juveniles who experience transfer."); *see also* Jeffrey Fagan, Aaron Kupchik, & Akiva Liberman, *Be Careful What you Wish For: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61, 69 (July 2007) (finding that "transfer to criminal court actually may increase the risk of violent and other serious crime by adolescents and young adults increasing public safety risks for citizens while heavily mortgaging the possibility of reformation or prosocial development for many transferred offenders."), *available at* http://ssrn.com/abstract=491202.

[65] *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 Criminology & Pub. Pol'y 8 (2011) (showing that for both adolescents and young adults an increase in the risk of arrest has a greater deterrent effect than the threat of longer prison sentences); *see also* Thomas A. Loughran et al., *Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 *Criminology* 699 (2009) (showing that there is no effect from incarceration, on future rates of rearrest or self-reported offending for serious juvenile offenders, and that there is no marginal effect for lengthier stays).

CONCLUSION

Extensive research data demonstrate that the notion of a generation of juvenile superpredators, which sought to explain the spike in juvenile crime in the late 1980s and early 1990s, and the predictions by the proponents of the juvenile superpredator myth that juvenile violent crime would continue to increase sharply, were wrong. Instead, juvenile crime rates have dropped significantly across demographic groups throughout the United States since the mid-1990s. The spike in juvenile violence in the early 1990s was a manifestation of an epidemic and not a lasting change in the social, psychological, cultural, or even genetic makeup of American youth. Yet the superpredator myth contributed to the dismantling of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment regime.

This legislation has been shown to have had no material effect on the subsequent decrease in crime rates. Indeed, states have experienced similar declines in juvenile violent crime rates since the mid-1990s, irrespective of whether their laws provided for prison sentences of life without parole for juvenile offenders. Thus, there is no empirical basis for any concern that applying the reasoning of *Roper* and *Graham* to bar the imposition of sentences of life without the possibility of parole on juveniles would result in an increase in violent juvenile crime.

Amici therefore urge that the Court reverse the judgments in the courts below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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AND
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IN THE

Supreme Court of the United States

EVAN MILLER,
Petitioner,
v.
ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,
Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Arkansas Supreme Court

BRIEF OF FORMER JUVENILE COURT JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of a group of former juvenile court judges as *amici curiae* in support of petitioners in both *Miller v. Alabama*, No. 10-9646, and *Jackson v. Hobbs*, No. 10-9647.[1] Because of their experiences as juvenile court judges, *amici* are familiar with the impressionability and immaturity that generally characterize juvenile offenders, as well as their ability to grow and change over time.

Amici believe that sentencing juveniles, even those who commit homicide offenses, to life without parole ignores the substantial differences between juvenile and adult offenders and meaningfully hampers the ability of these young people, who are uniquely capable of maturation, growth, and change, to rehabilitate and reform.

Having spent decades overseeing the cases of juvenile offenders and thus having witnessed firsthand their remarkable resilience, *amici* strongly believe that the criminal justice system cannot predict what kind of person a fifteen-year-old juvenile offender will be when he is 35, or 55, or 75. Rather, there should be some meaningful opportunity for the system to reassess whether incarceration remains necessary for these offenders after they have had the opportunity to grow, mature, and change.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

Individual *amici* are as follows:

• Judge Susan E. Block (ret.) served as Administrative Judge of the Family Court of St. Louis County in Missouri from 2000-2004, after three years as the Juvenile Judge. After her retirement in 2004, she joined Paule Camazine & Blumenthal as a principal where she specializes in complex family law matters.

• Judge Michael A. Corriero (ret.) served as a judge in the criminal courts of New York State for twenty-eight years. In the last fifteen years of his tenure, he presided over Manhattan's Youth Part, a special court established within the adult criminal court system where he was responsible for resolving the cases of thirteen-, fourteen-, and fifteen-year-olds who were charged with serious offenses and who were tried as adults pursuant to New York's Juvenile Offender Law. Judge Corriero is the Founder and Executive Director of the New York Center for Juvenile Justice.

• Judge Margaret S. Fearey (ret.) served as an Associate Justice in the Juvenile Court Department of the Trial Court of the Commonwealth of Massachusetts from 1996 until January 2012. In that capacity, she heard and decided numerous felony cases involving juveniles, including those involving adult sentencing options.

• Judge Gail Garinger (ret.) served as an Associate Justice in the Juvenile Court Department of the Massachusetts Trial Court from 1995-2001 and as the First Justice of the Middlesex County Division of the Juvenile Court Department from 2001-2008. From 2008 to the present, she has served as The Child Advocate for the Commonwealth of Massachu-

setts.

• Judge Martha P. Grace (ret.) served as Chief Justice of the Massachusetts Juvenile Court from 1998-2009 and as a Massachusetts Juvenile Court Judge for Worcester County from 1990-1998.

• Judge Julian Houston (ret.) served as Presiding Justice of the Juvenile Session of the Roxbury (Massachusetts) District Court from 1979-1990 before being appointed to the Massachusetts Superior Court.

• Judge Gordon Martin (ret.) served as a judge of the Massachusetts Trial Court from 1983-2004 where he heard both juvenile and adult cases. He was previously a Trial Attorney in the Civil Rights Division of the U.S. Department of Justice and First Assistant U.S. Attorney for the District of Massachusetts.

• Judge Chuck McGee (ret.) served for over thirty years as a Nevada judge whose duties always included a juvenile law calendar. He was twice made Chief Judge and was President of the District Judges Association. He has a Masters Degree in Juvenile Law from the Judicial College at the University of Nevada, Reno; his thesis was on a balanced approach to Juvenile Justice.

• Judge Lillian Miranda (ret.) served as First Justice of the Franklin-Hampshire Juvenile Court in Massachusetts from 1994-2011. Previously, she was Staff Counsel/Executive Director of Hampshire County Bar Advocates, where she was responsible for overseeing the assignment, training, and monitoring of private counsel who provided legal assistance to indigent adult and juvenile offenders

charged with crimes carrying a potential jail sentence or commitment to juvenile detention.

• Judge H. Ted Rubin (ret.) served as a judge on the Denver Juvenile Court for six years and then spent twenty-two years as Director for Juvenile Justice for the Institute for Court Management, National Center for State Courts. He has also served as a private consultant for juvenile courts and is the author of six books on juvenile justice, including *Juvenile Justice: Policies, Practices, and Programs*.

• Judge Irene Sullivan (ret.) retired last year after nine years as a juvenile judge, handling abuse, neglect, and delinquency cases in Pinellas County, Florida. She teaches juvenile law at Stetson University College of Law, is the author of *Raised by the Courts: One Judge's Insight into Juvenile Justice*, and speaks around the country on juvenile justice issues.

• Judge Darlene A. Whitten (ret.) served twenty years as a Judge on the Court at Law #1, Designated Juvenile Court for Denton County, Texas. Prior to going to law school, Judge Whitten taught junior high school.

SUMMARY OF ARGUMENT

The decisions of the courts below in both *Miller* and *Jackson* are wrong. They fail to sufficiently appreciate the dramatic differences between juvenile offenders, including those who commit homicide, and adult offenders, and they fail to recognize that the unique characteristics of juveniles make it impossible to predict at the time of initial sentencing whether a juvenile might one day be ready to leave prison. These distinguishing features of juveniles make the

sentence of life without parole categorically inappropriate for juvenile homicide offenders, just as this Court has already recognized for all other juvenile offenders.

Amici emphasize four points. First, juveniles who commit homicide offenses are just like juveniles who commit other serious offenses. They are less mature than adult offenders; they are more vulnerable to negative influences; and their characters and reasoning capacities are less fully formed. They also have less control over and experience with their environment. For these and other reasons, juvenile homicide offenders, just like other juvenile offenders, are less culpable for their actions and more susceptible to change.

Second, as petitioners' cases illustrate, many of the characteristics that distinguish juveniles from adults—for example, their greater immaturity and susceptibility to negative influences and their lack of control over their environment—often contribute to their criminal conduct, even in cases of homicide.

Third, juvenile homicide offenders, like other juvenile offenders, are capable of rehabilitation. Indeed, *amici* have been repeatedly impressed by the ability of young people, even those who commit very serious offenses, to mature and grow as they become adults. *Amici* recognize, of course, that not *every* juvenile offender will reform, but *amici*'s experiences as juvenile court judges convince them that it is impossible to accurately predict at the time of initial sentencing which juveniles are capable of change and which are not. The sentence of life without parole deprives the criminal justice system of the ability to make that assessment at a more appropriate

time, *viz.*, after the juvenile has had time to mature and reform. It also deprives the community of the skills and participation of the reformed offender.

Fourth, sentencing juveniles to life without parole unnecessarily hinders their otherwise unique capacities for rehabilitation. As an initial matter, it denies these youths any incentive to try to improve themselves and sends them a clear message that society has decided that they are beyond redemption. Moreover, even for those youths who want to try to better themselves, a sentence of life without parole will often make it more difficult for them to take advantage of whatever educational, vocational, and other rehabilitative programs are available.

ARGUMENT

I. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CATEGORICALLY DIFFERENT FROM ADULT OFFENDERS

As former juvenile court judges, *amici* have collectively spent decades presiding over cases involving thousands of serious (often violent) juvenile offenders. Based on their experiences, *amici* strongly believe that juvenile offenders, including those who commit homicide offenses, are categorically different from adult offenders.

As this Court has repeatedly recognized and *amici* have repeatedly witnessed, the characters of juveniles are not "as well formed" as those of adults. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Juveniles also suffer from a "lack of maturity" and an "underdeveloped sense of responsibility," and they are "more vulnerable or susceptible to negative in-

fluences." *Id.* at 569; *see Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). Moreover, "[b]ecause juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions." *Graham v. Florida*, 130 S. Ct. 2011, 2028-29 (2010) (quoting *Johnson*, 509 U.S. at 367).

Because these distinguishing features find their roots in the physiology of the adolescent brain, *see Graham*, 130 S. Ct. at 2026 (noting "fundamental differences between juvenile and adult minds"); *id.* ("parts of the brain involved in behavior control continue to mature through late adolescence"); *Roper*, 543 U.S. at 570; *see generally* Brief for the American Medical Association et al. as *Amici Curiae* in *Graham*, they exist regardless of the particular offense committed by the juvenile, *see Graham*, 130 S. Ct. at 2027 ("[t]hese matters relate to the *status* of the *offenders* in question" (emphasis added)).

Juveniles are also categorically different from adults because they "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("as legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting")). This, too, is true of all juveniles, regardless of the offense they may have committed.

In other words, the seriousness of the offense

simply does not change the fundamental characteristics of the offender. This Court has repeatedly suggested as much, emphasizing the broad differences between juveniles and adults even in cases involving juvenile homicide offenders. *See Roper*, 543 U.S. at 569-70; *Johnson*, 509 U.S. at 367; *Eddings*, 455 U.S. at 115-16. Thus, *all* juvenile offenders are categorically different from adults for reasons that are almost entirely out of their control—the developmental state of their brains and their surrounding environments. This is as true for juvenile homicide offenders as it is for other serious juvenile offenders.

As a result of these distinguishing characteristics, juvenile homicide offenders, like other juvenile offenders, are both less morally culpable for their actions and "more capable of change" than their adult counterparts. *Graham*, 130 S. Ct. at 2026. As this Court has explained, because "[t]he personality traits of juveniles are more transitory [and] less fixed" than those of adults, *Roper*, 543 U.S. at 570 (2005); *see Johnson*, 509 U.S. at 368 (1993), "their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 570); *see Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). Thus, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

Amici strongly believe that these essential, distinguishing characteristics of youth must be taken into account when sentencing *all* juvenile offenders, including those convicted of homicide.

II. THESE CASES ILLUSTRATE THE EXTENT TO WHICH THE DISTINGUISHING CHARACTERISTICS OF YOUTH CAN CONTRIBUTE TO JUVENILE CRIMINALITY, INCLUDING HOMICIDE

Both petitioners in these cases—Evan Miller and Kuntrell Jackson—illustrate the extent to which juvenile offenders, even juvenile homicide offenders, often become involved in criminal conduct as a result of their impetuousness, their lack of maturity, their susceptibility to negative influences, and their lack of control over their environment. *Amici* do not mean to excuse or minimize petitioners' involvement in their crimes. To the contrary, *amici* recognize that both Miller and Jackson committed very serious crimes, and that substantial punishment may be appropriate as a result. But *amici* think that it is important to recognize that these juvenile offenders, like all other juvenile offenders, are less culpable for their actions than would be a similarly situated adult due to their greater immaturity, their greater susceptibility to negative influences, and their lack of control over their environment.

Both Miller and Jackson, for instance, grew up in extremely troubled homes in crime-ridden environments, and the adults in their lives, rather than trying to protect them from the negative influences surrounding them, instead often guided them *toward* those influences. Miller was emotionally and physically abused by his stepfather and repeatedly exposed to serious substance abuse. Miller Record on Appeal ("Miller R.") 83.[2] Both his mother and step-

[2] This abuse may well have limited Miller's development in ways that made him even less mature and less capable of im-

father were alcoholics, and his mother was addicted to illicit drugs. *Id.* at 83-84. As a very young child, Miller emulated their behavior, drinking alcohol as early as age seven and using marijuana as early as age eight. *Id.* By the time he was thirteen, Miller was already abusing cocaine, prescription medications, and methamphetamines. *Id.*; *cf. Graham*, 130 S. Ct. at 2018 ("Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. . . . He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.").

It is impossible not to see the role that drugs, alcohol, and the negative influences of family and friends played in Miller's participation in the underlying homicide. During the summer after he completed seventh grade, Miller became friendly with Colby Smith, a sixteen-year-old with a teardrop tat-

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pulse control than a typical fourteen-year-old. *See, e.g.*, Allan N. Schore, *Early Relational Trauma, Disorganized Attachment, and the Development of a Predisposition to Violence*, *in* Healing Trauma: attachment, mind, body, and brain 107, 110 (Marion F. Solomon & Daniel J. Siegel, eds. 2003) ("[V]iolence in children may be a product of 'negative experiences such as early maternal rejection and unstable family environment' and . . . 'child abuse, particularly that involving physical injury, may be especially damaging.'" (quoting Christopher Filley, et. al, *Toward an Understanding of Violence: Neurobehavioral Aspects of Unwarranted Physical Aggression: Aspen Neurobehavioral Conference Consensus Statement*, 14 Neuropsychiatry, Neuropsychology, & Behavioral Neurology 1 (2001))); Martin H. Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 Cerebrum 50, 60 (2000) ("[W]e now know that childhood abuse is linked with excess neuronal irritability, EEG abnormalities, and symptoms suggestive of temporal lobe epilepsy.").

too on his face, a mark that often signifies that the bearer has murdered someone. Miller Trial Tr. 979, 1001. One afternoon, Smith and Miller smoked crystal methamphetamines, and then watched as Miller's mother engaged in a drug deal with their neighbor in Miller's home. *Id.* at 1004, 1007. With the neighbor preoccupied at Miller's house, the boys decided to break into his home to look for drugs. *Id.* at 1006. Although they did not find any drugs, they stole some baseball cards before returning to Miller's home. *Id.* at 981-82.

Later that evening, the boys accompanied the neighbor to his home with the intention of robbing him; instead, the neighbor gave them money to purchase marijuana. *Id.* at 982, 1008, 1012. When the boys returned with the marijuana, they smoked it with the neighbor and played a drinking game with whiskey. *Id.* at 982-83, 1008, 1012, 1014-15. The neighbor became so intoxicated that he fell down and eventually passed out on the couch. *Id.* at 983-84. The boys decided to steal the money in the neighbor's wallet, so Miller removed it from his back pocket, and the boys divided the $300 inside. *Id.* at 984. When Miller returned the wallet to the neighbor's pocket, the neighbor woke up and grabbed Miller by the throat. *Id.* Smith picked up a baseball bat and hit the neighbor with it to free Miller. *Id.* at 985. The boys continued to beat the neighbor, and Miller, presumably still under the influence of the marijuana and whiskey, placed a sheet over his head, said he was God, and stated that he was going to kill the neighbor. *Id.* at 985-86. After returning to Miller's residence, the boys decided to go back to the neighbor's home to clean up the blood and, while there, started the fires that ultimately killed him. *Id.* at

987-88.

Jackson, too, grew up in a troubled environment: his neighborhood was infested with gang violence and drug activity, Jackson Record on Appeal ("Jackson R.") 81, and the adults in his life failed to protect him from the negative influences around him. Instead, they regularly exposed him to violence. His mother and her boyfriend fought repeatedly. *Id.* at 80. His grandmother shot her own son—Jackson's uncle. *Id.* at 81. Jackson's mother shot their neighbor after a fight broke out between Jackson's older brother and the neighbor's daughter and, as a result, went to jail when Jackson was just five or six. *Id.* at 80. Jackson's older brother also owned guns and was incarcerated for a robbery involving a shooting at the time when Jackson participated in the felony underlying the sentence at issue in this case. *Id.* at 82.

Jackson's offense demonstrates how easily juveniles in certain family and social environments can become involved in criminal conduct—even very serious criminal conduct—as a result of peer pressure and negative external influences. Seventeen days after his fourteenth birthday, Jackson accompanied some friends to a video store that they planned to rob. Jackson R. 52. Although one of his friends carried a firearm, Jackson did not. And when they arrived at the store, Jackson told his friends that he did not want to go into the store, deciding to wait outside instead. *Id.* When he later entered the store, he was shocked to see that his friends had pulled out the firearm and screamed "'I thought you all was playin'." *Id.* at 54. Jackson did not touch the firearm, much less actually shoot anyone. *Id.* at 56-

57, 68.

The death that occurred in the course of the robbery was tragic and inexcusable, but it is impossible not to see the role that immaturity, susceptibility to negative peer influences, and lack of control over his environment—factors that undeniably affect juveniles like Jackson categorically differently from how they affect adults—played in Jackson's involvement in the crime.

III. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CAPABLE OF REHABILITATION

Amici have been repeatedly impressed and surprised by the ability of juvenile offenders—including very serious offenders—to change and reform as they grow older and come to better appreciate the consequences of their actions.

As this Court has recognized, juvenile offenders, including those who commit homicide, are uniquely capable of reform and rehabilitation because their personalities are not yet fully formed when they commit their offenses. *See Graham*, 130 S. Ct. at 2030 (noting that juvenile offenders are "most in need of and receptive to rehabilitation"); *Roper*, 543 U.S. at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."); *see also, e.g.*, Dorothy Otnow Lewis et al., *Toward a Theory of the Genesis of Violence: A Follow-up Study of Delinquents*, 28 J. Am. Acad. Child & Adolescent Psychiatry 431, 431 (1989) ("many violent juveniles do not become violent adults").

Amici recognize, of course, that not all juvenile offenders who commit homicide crimes will ultimately be reformed and rehabilitated; the same is true of juvenile offenders more broadly. But *amici* firmly believe that it is impossible to tell at the time of sentencing *which* juveniles will prove capable of reform. Thus, juvenile homicide offenders, like all other juveniles, should be afforded a meaningful opportunity to demonstrate growth and maturity.

A. Juvenile Homicide Offenders Are Capable of Rehabilitation If Provided the Right Opportunities

As this Court has observed, the fact that a person committed a crime as a juvenile, even a heinous crime, does not tell us who that person will be as an adult. *See supra* at 6-8. In fact, many juveniles serving life without parole sentences, including juvenile homicide offenders, come to recognize that what they did as a juvenile was deeply wrong. Many of these individuals show signs of genuine growth while in prison, taking advantage of what limited opportunities for education and personal development are available, even though they know they will be unable to make use of their new skills in the outside world. *See, e.g.*, Human Rights Watch, Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 83-84 (2005), at http://pendulumfoundation.com/TheRestofTheirLives.pdf [hereinafter "The Rest of Their Lives"]; *see also infra* at 22-24 (describing the limited range of programs available to juvenile prisoners sentenced to life without parole).

The most compelling proof that juvenile homicide offenders are capable of rehabilitation comes from

those offenders who have been released from prison and become law-abiding, productive citizens as adults. Raphael Johnson, for example, committed murder at the age of 17. After being thrown to the ground during an altercation at a party, he went to a friend's car, got a gun, and fired three shots, killing a man who had not even been involved in the fight. *See Juvenile Justice Accountability and Improvement Act of 2007: Hearing on H.R. 4300 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 54-58, at 55 (2008) (statement of Raphael B. Johnson). Johnson was tried as an adult, convicted of murder, and sentenced to 10 to 25 years in prison. *Id.* In his first years behind bars, Johnson admits that he was not a model inmate; he violated prison rules and was placed in solitary confinement. *Id.* at 55-56. But over time his outlook began to change. *Id.* at 56. He took advantage of the educational programs available to him, explored his religious beliefs, and maintained strong bonds with his family and friends. *Id.*

After serving twelve years in prison, Johnson was released. *Id.* at 57. In the four years following his release, he earned his college degree, graduating with high honors, and went on to earn a master's degree as well. *Id.* He married his childhood sweetheart and had two children. *Id.* Johnson worked as a community reintegration coordinator, helping other ex-offenders re-enter society, and even started his own company, through which he works as a motivational speaker. *Id.* Johnson has expressed remorse for his crime and explained how additional life experience has afforded him perspective on the pain he caused, a fact that he was unable to fully appreciate

as a teenager. *Id.* at 58.

Oshea Israel is another example of a juvenile homicide offender who proved capable of reform as he grew into an adult. *See* NPR, *Forgiving Her Son's Killer: "Not An Easy Thing"* (May 20, 2011), http://www.npr.org/2011/05/20/136463363/forgiving-her-sons-killer-not-an-easy-thing. At the age of sixteen, Israel killed a twenty-year-old after getting into a fight with him at a party. *Id.* While in prison, Israel met his victim's mother and started changing his approach to life. *Id.* Recently released from prison, he is now pursuing his college degree and has developed a close relationship with the mother of his victim. *Id.* He has explained that he hopes to "prove himself" to her. MailOnline, *Woman shows incredible mercy as her son's killer moves in next door* (June 8, 2011), http://www.dailymail.co.uk/news/article-2000704/Woman-shows-incredible-mercy-sons-killer-moves-door.html#ixzz1hw0jIdyb.

Studies of juvenile homicide offenders mirror the lessons of Johnson's and Israel's stories, making clear that many youths who have committed homicide offenses are capable of rehabilitation and growth. *See, e.g.*, Michael P. Hagan, *An Analysis of Adolescent Perpetrators of Homicide Upon Return to the Community*, 41 Int'l J. of Offender Therapy & Comparative Criminology 250, 254 (1997) (forty percent of youths convicted of homicide or attempted homicide and committed to juvenile correctional facility in Wisconsin in the 1970s and 1980s had not been convicted of any additional crimes five or more years after their release from the facility); John Hubner, Last Chance in Texas: The Redemption of Criminal Youths 20, 251 (2005) (relating, among

other stories of serious juvenile offenders, one juvenile's involvement in a drive-by shooting that killed a 20-year-old man and the offender's subsequent release after completing an intensive rehabilitation program at the Giddings State School).

These stories and studies merely confirm what *amici* already know from their own experiences: many juvenile offenders, even the most serious among them, are capable of reform and rehabilitation.

B. It Is Impossible To Predict at Sentencing How a Juvenile Will Change Over Time

Amici recognize, of course, that a desire to change is not always enough to ensure change. And recitation of regret for one's crimes does not absolve a juvenile offender of responsibility for his actions or guarantee that he will not commit further crimes if released.

But *amici* strongly believe that juvenile offenders, including those convicted of homicide offenses, deserve the opportunity to turn their lives around, and that the best time to evaluate whether they have successfully done so is after they have had time to mature, not when they are initially sentenced. Based on decades of experience sentencing juvenile offenders, *amici* simply do not believe it is possible to tell which youths will change and which will not at the time of their initial sentencing.[3]

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[3] Notwithstanding this unpredictability, *amici* do believe that individualized consideration is essential at the initial sentencing stage. *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229, 1239-40 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider

In fact, throughout their many years as juvenile court judges, *amici* were repeatedly surprised and encouraged by the ability of youths, including those who commit the most serious crimes, to grow and change. *Amici* were also struck by the difficulty of predicting which youths would successfully reform and which would not. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); *Naovarath v. State*, 105 Nev. 525, 530 (1989) ("We may possibly have in the child before us the beginning of an irremediably dangerous adult human being, but we certainly cannot know that fact with any degree of certainty *now*.").

Amici are hopeful that Miller and Jackson may too one day mature into responsible, law-abiding

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every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))); *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring in the judgment) ("Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them."); *cf.* Michael A. Corriero, Judging Children as Children: A Proposal for a Juvenile Justice System 71 (2006) ("We must examine each child's individual circumstances and social history."). Thus, although *amici* believe that *no* juvenile should be sentenced to life without parole, *amici* are even more troubled by the fact that the petitioners in these cases were subject to *mandatory* life without parole sentences and thus were denied any individualized consideration even at their initial sentencing. *See Graham*, 130 S. Ct. at 2031 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

adults. Before he was sentenced, Jackson apologized to the family of the victim. Jackson R. 62. And Miller has learned to accept responsibility for his actions: his pretrial psychological evaluation notes that "he previously would have given more antisocial responses," but that "he 'got saved at 15,'" and now "recognizes that he should do 'the right thing.'" Miller R. 85. *Amici* believe that these children should not be condemned to die in prison without being given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030.

Imposing a sentence of a term of years (even a long one)—as opposed to a sentence of life without parole—recognizes that although these children "deserve[] to be separated from society for some time," "it does not follow that [they will] be a risk to society for the rest of [their] li[ves]." *Graham*, 130 S. Ct. at 2029; *see Naovarath*, 105 Nev. at 531 ("It does not seem to us, from the record, that the trial judge had enough information to make the predictive judgment that this particular thirteen-year-old boy should never again see the light of freedom. A strong argument exists for the proposition that the parole board is best suited to make this kind of judgment at some future time."); *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968) ("We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); *cf. Graham*, 130 S. Ct. at 2030 ("Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not fore-

close [that]. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.").

Leaving open the possibility of parole allows society to assess down the road—after the juvenile has had the time necessary to grow, mature, and change—whether it is necessary for a 25, 35, or 45-year-old to remain in prison for a crime he committed early in his formative years. Life without parole sentences, however, eliminate the possibility of such meaningful consideration of a juvenile offender's demonstrated rehabilitation.

IV. A LIFE WITHOUT PAROLE SENTENCE SIGNIFICANTLY LIMITS A JUVENILE'S ABILITY TO REFORM AND CHANGE

Amici believe that sentencing juvenile offenders to life without parole is wrong because it meaningfully hinders a juvenile's otherwise unique prospects for reform and rehabilitation. Juvenile homicide offenders, like all other juvenile offenders, should be given the chance to better themselves in prison and afforded a meaningful opportunity to obtain release based on a showing that they have done so.

A. Sentencing Juveniles to Life Without Parole Denies Them Hope and the Incentives To Try To Reform

Life without parole is, under any circumstance, a severe sentence—the most severe possible after capital punishment. But as this Court recognized in *Graham*, it is "an especially harsh punishment for a juvenile." *Graham*, 130 S. Ct. at 2028. This is, in part, because it reflects "an irrevocable judgment about that person's value and place in society."

Graham, 130 S. Ct. at 2030; *see Naovarath*, 105 Nev. at 529 (life without parole reflects a judgment that the child "can never be reformed"). It sends a clear message to the juvenile that society has given up on him or "written [him] off." Ill. Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 20 (2008), http://webcast-law.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf [hereinafter, "Categorically Less Culpable"]. This is a particularly cruel message to send to juvenile offenders, many of whom may feel as though they have already been abandoned by their parents and other family members. *See, e.g.*, Rolf Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 Crime & Just. 29, 29 (1986) ("Analyses of longitudinal data show that socialization variables, such as lack of parental supervision, parental rejection, and parent-child involvement, are among the most powerful predictors of juvenile conduct problems and delinquency."); Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 Yale L.J. 1885, 1900 (1994) ("[j]uvenile delinquency has been found to correlate with a history of childhood abuse and neglect"); *see also* Irene Sullivan, Raised by the Courts: One Judge's Insight into Juvenile Justice 97 (2010) ("The link between child abuse and juvenile delinquency is well established; indeed, irrefutable."); H. Ted Rubin, Juvenile Justice: Policies, Practices, and Programs P4-1 (2003) ("Court juveniles' problems include . . . drug addicted parents, serious neglect by parents, violent victimization.").

Life without parole amounts to the "denial of hope," *Graham*, 130 S. Ct. at 2027, such that juveniles receiving the sentence often see little reason to try to educate or otherwise improve themselves. Life without parole means that "good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* (quoting *Naovarath*, 105 Nev. at 526). As one juvenile offender explained: "'It makes you feel that life is not worth living because nothing you do, good or bad, matters to anyone. You have nothing to gain, nothing to lose, you are given absolutely no incentive to improve yourself as a person. It's hopeless.'" Human Rights Watch, *"When I Die, They'll Send Me Home," Youth Sentenced to Life without Parole in California* 60 (Jan. 2008), www.hrw.org/reports/2008/us0108/ us0108web.pdf [hereinafter, "Youth Sentenced to LWOP in California"]; *see also id.* (juvenile offender sentenced to life without parole reporting that "[t]here's no words to describe this experience. I'd rather be dead"); The Rest of Their Lives, at 63 (another juvenile offender sentenced to life without parole asking "'what am I supposed to hope for except for dying tomorrow maybe?'").

B. Sentencing Juveniles to Life Without Parole Denies Them Opportunities To Participate In Educational and Rehabilitation Programs

Even juvenile offenders sentenced to life without parole who want to change will often find that their sentence makes it more difficult for them to do so. Although the adult prisons where these juveniles

will be serving most (if not all) of their sentences generally provide educational, vocational, and other self-help programs, access to these opportunities is often foreclosed to prisoners sentenced to life without parole. *See, e.g.*, Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* 27 (2012), http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf [hereinafter "Against All Odds"] (noting that in at least 22 states "educational and vocational programs ordinarily available to most inmates are frequently denied to those serving life without parole, including those sentenced as juveniles"); Categorically Less Culpable, at 21 (explaining that juvenile offenders sentenced to life without parole had "little or no access to educational programs" because those "programs often were, and are, expressly denied to those serving life without parole sentences").[4]

Funding and resource constraints, for example, often limit access to such programs to offenders who may be eligible for release. *See, e.g.*, The Rest of Their Lives, at 69 ("Most child offenders who have been sentenced to life without parole are denied access to further education or vocational programs for a very simple reason: the state and the federal government do not expect them ever to leave prison and

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[4] Juvenile offenders' inability to participate in educational and vocational programs may reinforce for these youths the impression that society has given up on them. As one offender explained with respect to his inability to enroll in his prison's GED program, "'[t]he officials say there are more important people that need to take these classes that actually have a chance to get out someday.'" Categorically Less Culpable, at 21.

so reserve the already underfunded programs for those who will."); Youth Sentenced to LWOP in California, at 56 ("[P]rison practice and regulations give persons sentenced to life without parole the lowest priority for accessing programs. Interviewees told Human Rights Watch that their sentence puts them on the lowest rung of waiting lists for GED classes and substance abuse rehabilitation groups like Alcoholics Anonymous . . . ."); The Rest of Their Lives, at 70 ("Correctional authorities in a number of states told a researcher for this report on the record that inmates serving life without parole sentences were at the 'bottom of the list' for getting access to vocational training. Officials cited their state's need 'to put our resources where the inmates who are going home can access them first.'").

And in some states, "[s]ecurity classifications" can "limit participation in existing programs." Against All Odds, at 29. Although "[m]ost prisoners can reduce their security level over time through good behavior," it is exceedingly difficult for those serving life without parole to do so. Youth Sentenced to LWOP in California, at 57; *see id.* at 57-58 (explaining that "for those serving life without parole, a change in security classification . . . requires a decision by the Deputy Director after review by a classification committee"); *cf.* Against All Odds, at 28-29 (explaining how juveniles and those serving life without parole generally receive more restrictive security classifications). Thus, even if juvenile offenders exhibit exemplary behavior over the course of many years in prison, they may continue to be denied opportunities to better themselves at the ages of 35 and 55 based on a single act they committed at the age of 15.

The denial of access to these programs is particularly troubling because participation in educational and vocational programs can be "an important step on the path toward rehabilitation," Categorically Less Culpable, at 22; *see, e.g.*, Michael A. Corriero, Judging Children as Children: A Proposal for a Juvenile Justice System 59-60 (2006) (discussing the importance of education to rehabilitation), especially for juvenile offenders who will spend their formative teenage years behind bars, *see* Against All Odds, at 32 ("young offenders are incarcerated during the period of their lives when education and skill development are most crucial").

Amici have personally observed the potential transformative power of prison educational and rehabilitative programs. For example, one of *amici* sentenced a sixteen-year-old who had killed a taxi driver to serve 15 to 20 years, the sentence mandated by his jurisdiction at the time for first degree murder committed by a juvenile. The juvenile matured while in prison and was deemed fully rehabilitated by the time he had served the 15 year minimum. Another of *amici* sentenced a homicide offender roughly the same age as Miller and Jackson to serve nine years to life in prison. That young man has educated himself significantly while in prison and, over time, has come to recognize the wrong that he committed and has expressed remorse for his actions. Both of these examples reflect *amici*'s belief that access to rehabilitative programs while in prison, combined with the added maturity that comes with age, can effect substantial, meaningful changes in a young offender.

CONCLUSION

For the foregoing reasons and those stated in petitioners' briefs, this Court should reverse the judgments below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Writ Of Certiorari To The
Alabama Court Of Criminal Appeals

KUNTRELL JACKSON,
Petitioner,
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,
Respondent.

On Writ Of Certiorari To The
Supreme Court Of Arkansas

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INTEREST OF *AMICI*[1]

The organizations submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment.

IDENTITY OF *AMICI*

See Appendix for a list and brief description of all *Amici*.

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[1] The consent of counsel for all parties is on file with the Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A brief description of all *Amici* appears in the Appendix.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the briefs of Petitioners Kuntrell Jackson and Evan Miller.

SUMMARY OF ARGUMENT

The imposition of life without parole sentences on juveniles violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the Supreme Court has held, juvenile offenders are categorically different from adult offenders in constitutionally relevant ways. According to settled research, juveniles are immature in their judgment and decision-making capacities, they are especially susceptible to negative peer pressures, and they are uniquely capable of transformation and rehabilitation. As found in *Roper v. Simmons* and *Graham v. Florida*, juveniles as a class are less culpable for their criminal conduct than adults.

Culpability is a cornerstone of our criminal justice system, and it is central to ensuring that sentences are rational and proportional under the Eighth Amendment. Traditionally, the Court has looked primarily to the nature of the offense to assess proportionality. In the case of juveniles, this Court has modified its traditional Eighth Amendment analysis to focus specifically on the unique attributes and characteristics of the juvenile offender in reviewing the constitutionality of sentences. The reduced culpability of juveniles renders life without parole sentences inherently disproportionate under

the Eighth Amendment and thus categorically impermissible.

In the instant cases, the sentencing schemes in Alabama and Arkansas compound the constitutional infirmity of a life without parole sentence. In both cases, the sentences were mandatory. Following this Court's reasoning in striking mandatory death sentences under the Eighth Amendment, a mandatory juvenile life without parole sentence by its nature precludes considerations of the individual juvenile offender or the circumstances of his crime. Absent these considerations neither the sentencer nor the reviewing court have any ability to assess the proportionality of the sentence to a particular juvenile. A mandatory scheme thus precludes constitutionally relevant evidence of youth, lesser criminal involvement, and potential for maturity and therefore impermissibly taints the reliability of the sentence. Additionally, Jackson's life without parole sentence following a conviction of felony murder is squarely at odds with this Court's holding in *Graham* that juveniles who neither kill, intend to kill, or foresee that life will be taken are constitutionally ineligible for such sentences.

Finally, this Court has repeatedly acknowledged that the risk of wrongful convictions is of concern in evaluating the harshest sentences imposed on certain categories of offenders. Research demonstrates that juveniles are particularly at risk of giving false confessions because of their developmental characteristics, further supporting increased scrutiny of such sentences under the Constitution.

ARGUMENT

In the last six years, this Court has issued three landmark decisions that profoundly alter the status and treatment of juveniles in the justice system. Construing the Eighth Amendment, the Court abolished the juvenile death penalty in 2005 in *Roper v. Simmons*. In 2010, the Court struck a sentence of life without parole imposed on a juvenile convicted of a nonhomicide offense in *Graham v. Florida*. Last term, interpreting the Fifth and Fourteenth Amendments, the Court held in *J.D.B. v. North Carolina* that a juvenile's age is relevant to the *Miranda* custody analysis. In all three cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

The constitutionality of a life without parole sentence imposed on juveniles convicted of homicide offenses is now before the Court. Jackson and Miller were fourteen years old at the time of their offenses. Jackson was convicted of capital felony murder based upon his participation in an attempted robbery in which the victim was killed by a co-defendant; Miller was convicted of capital murder. In both cases, the sentences were mandatory upon conviction under the relevant state law. *Amici* submit that this Court's current Eighth Amendment jurisprudence concerning what constitutes cruel and unusual punishment for *juveniles* requires that these sentences be struck.

Roper confirmed that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder. *Roper's* distinct doctrinal approach was extended to sentences of life without parole in *Graham*, as the Court saw no meaningful distinction between a sentence of death or life without the possibility of parole. That death comes later or more slowly in the latter instance does not alter the stark finality of the sentence.

Graham and *Roper* have equal application here. Together, they dictate a distinct Eighth Amendment analysis for juveniles, premised on the simple fact that youth are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment. As both the majority and the dissent agreed in *Roper* and *Graham*, this Court has supplanted its 'death is different' analysis in adult Eighth Amendment cases for an offender-focused 'kids are different' frame in juvenile cases. *See Graham v. Florida*, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 558-59 (2005) (O'Connor, J., dissenting).

Juveniles are uniquely different from any other category of offender; the Court has properly

crafted a separate Eighth Amendment analysis to take account of their exceptional status.

I. A JUVENILE LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE

When evaluating sentences under the Eighth Amendment, this Court must look "beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 130 S. Ct. at 2021 (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).[2] *Graham* and *Roper* reflect the Court's own evolving understanding of the salient developmental differences between juveniles and adults. As these developmental differences continue to inform this Court's decisions involving children's constitutional rights in the justice system, the scrutiny of juvenile sentencing practices must yield to a different set of constitutional principles.

A. The Eighth Amendment Requires That Sentences Be Proportionate

"Proportionality" is central to the Court's analysis of sentencing practices under the Eighth Amendment. *See, e.g., Graham*, 130 S. Ct. at 2021 (citing *Solem v. Helm*, 463 U.S. 277 (1983)) (interpreting the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "unconstitutionally excessive"). Cases

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[2] The cruel and unusual standard "embodies a moral judgment," which "must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal citation omitted).

addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.* The "categorical" classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender*. *Id.* at 2022. Thus, some offenders have characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes. *See, e.g., Roper*, 543 U.S. 551 (striking the death penalty for juvenile defendants); *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking the death penalty for mentally retarded defendants); *Kennedy*, 554 U.S. 407 (striking the death penalty for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham*, 130 S. Ct. 2011 (striking sentences of juvenile life without parole in nonhomicide cases).

The Court has adopted a two-pronged analysis in categorical challenges. It first considers "objective indicia of society's standards as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the practice. *Roper*, 543 U.S. at 563. Next, the Court must determine "in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 130 S. Ct. at 2022 (citing *Roper*, 543 U.S. at 572). The Court's 'judgment' is guided by its "own understanding and interpretation of the Eighth

Amendment's text, history, meaning and purpose." *Id.* (citing *Kennedy*, 554 U.S. at 421). While community consensus is "entitled to great weight," it "is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 130 S. Ct. at 2026 (citing *Kennedy*, 554 U.S. at 435). Ultimately, the task of interpreting the Eighth Amendment remains the responsibility of this Court. *Roper*, 543 U.S. at 575.

In exercising its own judgment, the Court considers the culpability of the offender in light of his crime and individual characteristics; the severity of the punishment in question; and whether the challenged punishment serves legitimate penological goals. *Id.* at 568, 571-72.

B. The Eighth Amendment Requires A Separate Proportionality Analysis For Juvenile Offenders

As Justice Frankfurter wrote over fifty years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953). *Graham* echoed this point: Justice Kennedy observed that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031. Accordingly, a developmental framework for assessing juvenile sentencing practices has emerged, narrowing the

range of permissible sentencing options for offenders under the age of eighteen.

A child's age is far "more than a chronological fact"; it bears directly on children's constitutional rights and status in the justice system. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Graham* and *Roper* enriched the Court's longstanding view of juveniles with scientific research confirming that youth merit distinctive treatment under the Eighth Amendment. *See, e.g.*, Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764 (2008).[3] Indeed, this Court has been explicit that juvenile status drives constitutional status in juvenile and criminal proceedings. *See, e.g.*, *Haley v. Ohio*, 332 U.S. 596, 601 (1948) ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."). *See also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (in confession case, observing that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.").

The *Graham* Court noted three characteristics that distinguish youth from adults for culpability purposes: 1) juveniles have a "lack of maturity and an underdeveloped sense of responsibility;" 2) they

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[3] The Court in *J.D.B.* noted that "[a]lthough citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experience bears out." 131 S. Ct. at 2403 n.5.

"are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and 3) their characters are "not as well formed." 130 S. Ct. at 2026 (internal quotations omitted). The Court noted that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70, 573). This Court concluded, "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).[4]

The culpability of the offender is a cornerstone of our criminal justice system and central to ensuring the rationality of sentencing. *See Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). This Court has held that juveniles as a class have a reduced culpability for their criminal conduct. Because of this reduced culpability, life without parole sentences are categorically unconstitutional when imposed on a juvenile.[5]

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[4] *See* Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008) (explaining that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.")

[5] This Court has recognized that "[l]ife without parole is an especially harsh punishment for a juvenile." *Graham*, 130 S. Ct.

at 2028. A life without parole sentence imposed on a child is not only longer, it is also qualitatively different. The conditions children face in adult prisons exacerbate the disproportionality of juvenile life sentences. *See* Human Rights Watch, *Against All Odds: Prison Conditions for Youth Serving Life Without Parole Sentences in the United States*, 18 (2012), http://www.hrw.org/reports/2012/01/03/against-all-odds-0. (reporting that almost all youth offenders serving life without parole interviewed or surveyed by Human Rights Watch suffered physical violence at the hands of other inmates); *id.* at 14, n.24 ("In 2005 . . . individuals under the age of 18 made up less than 1 percent of all inmates in U.S. jails. Yet 21 percent of all victims of substantiated incidents of sexual abuse involving jail inmates that year were under the age of 18.") (internal citation omitted); Marty Beyer, *Experts For Juveniles At Risk of Adult Sentences*, in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE (P. Puritz, A. Capozello, & W. Shang eds., 1997) ("Youth in adult facilities were eight times more likely to commit suicide than their counterparts held in the juvenile justice system."); Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 Psychiatric Servs. 966, 969-70 (2008) (noting that 35% of detained adult males have a psychiatric disorder as compared to 64% of youths in adult custody and "the conditions associated with extended detention, such as separation from loved ones, crowding, and solitary confinement, may increase the risk of suicidal behavior."). The lack of rehabilitation afforded to juveniles serving life without parole sentences further aggravates the disproportionate nature of the sentence. *See Graham*, 130 S. Ct. at 2030 ("[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.") (internal citations omitted).

II. MANDATORY LIFE WITHOUT PAROLE SENTENCES UNCONSTITUTIONALLY DEPRIVE JUVENILES OF ANY CONSIDERATION OF THE RELEVANT CHARACTERISTICS OF YOUTH

Petitioners Miller and Jackson both received mandatory life without parole sentences after conviction of a homicide offense. These sentences were imposed without any consideration of the particularities of their underlying offenses or their relative moral culpability and are therefore unconstitutional. *Amici* support a categorical ban on such terminal sentences for juveniles in all cases. As discussed above, this Court's Eighth Amendment proportionality analysis forecloses the imposition of such sentences. Additionally, under any circumstances, there is no place in this Court's Eighth Amendment jurisprudence for *automatic* sentences of life without parole for juveniles in homicide cases.

This Court held over three decades ago that mandatory death sentences for adults are, in all cases, unconstitutional:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and

> record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process. . . .

Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (citation omitted). *See also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (Court recognized over seventy-five years ago that justice in sentencing "generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

The recognition that the elements of criminal offenses alone are generally insufficient to provide an accurate sentencing picture has animated this Court's constitutional criminal law jurisprudence throughout the post-World War II era. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 247 (1949) ("Highly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.") (footnote omitted). The *Williams* Court fully understood that considerations for conviction were necessarily different than those for punishment. The Court noted:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The whole country has

> traveled far from the period in which the death sentence was an automatic and commonplace result of convictions.

Id. This observation ultimately informed the Court's subsequent ruling that mandatory death sentence schemes violated the Eighth and Fourteenth Amendments. Because mandatory sentences preclude consideration of both the individual aspects of the crime and the offender, mandatory sentences of death are uniformly prohibited. *See Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (terminal sentencing schemes must permit "the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual," no matter how aggravated the homicide).

The analysis foreclosing mandatory capital punishment should likewise apply to the terminal sentence of life without the possibility of parole for juveniles. In the instant situation, the individual characteristics of the offenders require judicial scrutiny before a terminal sentence of life without parole can be imposed under the Eighth Amendment. Yet neither the Alabama nor Arkansas sentencing schemes permit any consideration of the offender's age, maturity, or potential for reform. *See Graham*, 130 S. Ct. at 2032. Therefore, like adult mandatory death sentences, mandatory life without parole sentences for juveniles must be prohibited in all cases.

A. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Prevent This Court From Fulfilling Its Constitutional Review Function

In the adult death penalty context, a mandatory sentencing procedure implicates the Eighth Amendment's requirement of heightened reliability of such sentences. Heightened reliability is necessary because: "the penalty of death is qualitatively different from a sentence of imprisonment. . . . Because of that qualitative difference, there is a corresponding difference in the *need for reliability in the determination that death is the appropriate punishment in a specific case.*" *Woodson*, 428 U.S. at 305 (emphasis added). Such heightened reliability can only be accomplished if courts are satisfied that the procedures in place adequately ensure that the sentence properly reflects the moral culpability of the offender. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (jurors must be allowed to express a "reasoned moral response" regarding the defendant's "moral culpability").

This is precisely the same question courts must face when assessing a juvenile sentence of life without parole because "an offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Graham*, 130 S. Ct. at 2028.

The same heightened reliability concerns that forced the ban on adult mandatory death sentences

likewise bar the imposition of mandatory juvenile life without parole sentences. First, there is no meaningful constitutional difference between adult capital sentences and juvenile life without parole sentences. As this Court noted in *Graham*:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration. . . .

130 S. Ct. at 2027. As Chief Justice Roberts made plain, "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate. . . ." *Id.* at 2039 (Roberts, C.J., concurring).

First, the *Graham* majority held that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their eligibility to re-enter society. 130 S. Ct. at 2030. Moreover, *Graham* and *Roper* both explicitly provide that the capacity of juvenile offenders to change and grow, combined with their reduced blameworthiness and inherent immaturity, set them apart from adult offenders in pronounced, constitutionally relevant ways. Mandatory

sentencing schemes by definition preclude individualized determinations. This 'one size fits all' sentencing practice is thus directly at odds with *Graham* and *Roper*, since it bars consideration of age at all in sentencing while simultaneously proscribing any "realistic opportunity" for release. *Id.* at 2034.

Second, automatic sentencing procedures undermine reliability by precluding the consideration of the relationship between the sentence and constitutionally relevant factors such as the nature of the particular offense and the specific offender. Such proportionality determination is constitutionally required in any review of juvenile life without parole sentences. *Id.* at 2030. Mandatory sentencing schemes preclude such review and therefore violate the Constitution.

In any juvenile case in which the sentence is life without parole, the lack of reliability in the sentence or verdict impermissibly impairs the Court's ability to conduct the constitutionally mandated proportionality evaluation. In short, no court can have any confidence that a mandatory sentence of life without parole for a juvenile has a sufficient relationship to that offender's personal moral culpability, maturity, or potential for reform.

B. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Undermine The Reliability Of The Sentence As It Relates To The Defendant's Moral Culpability And Potential For Maturity And Reform

In *Roper*, this Court held that the juvenile death penalty violated the Eighth Amendment because juveniles are presumed to be less morally culpable than adults who may commit the same crime. 543 U.S. at 570. In *Graham*, the Court relied on the same youthful characteristics to categorically ban sentences of life without parole for juveniles in nonhomicide crimes, particularly because "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." 130 S. Ct. at 2029; *see also id.* at 2038 (Roberts, C.J., concurring).[6]

The flaw in mandatory life without parole statutes is that the constitutionally relevant qualities associated with juveniles may never be considered by the sentencing court. Rather, this Court's acknowledgement of youth's diminished moral culpability in *Roper* and *Graham* is replaced with a non-rebuttable presumption of equal moral culpability between adults and juveniles. In other words, mandatory sentences of life without parole

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[6] Chief Justice Roberts in *Graham* characterized the Court's juvenile punishment cases as recognizing "that juvenile offenders are *generally* – though not necessarily in every case – less morally culpable than adults who commit the same crimes." 130 S. Ct. at 2038 (Roberts, C.J., concurring).

rest on the unconstitutional premise that juveniles are *always* as morally culpable as adults.

As was found in the adult death penalty context, such a premise unconstitutionally undermines the reliability that the sentence is an actual reflection of the moral culpability of the juvenile offender:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the [punishment].

Woodson, 428 U.S. at 304. In the context of juvenile sentencing, the constitutionally relevant factors of maturity and potential for reform are among those "relevant facets of character" that are precluded by a mandatory sentence. In his concurrence in *Graham*, Justice Roberts cautioned that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." *Id.* at 2042 (Roberts, C.J., concurring). Mandating a life without parole sentence violates *Graham* at both the

front and back end of the sentence as the individual characteristics and circumstances of the juvenile offender will not, as a matter of law, *ever* be considered.[7]

In the instant cases, both Petitioners presented evidence of their youth at the time of the offense – a constitutionally relevant sentencing factor that the mandatory scheme precluded from consideration. The Petitioners also provided other compelling evidence regarding the circumstances of the offense and their personal qualities that indicated diminished moral culpability beyond (and intertwined) with their very young age.

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[7] The high prevalence of disabilities in juveniles involved in the criminal justice system further impedes the reliable assessment of juvenile culpability. Incarcerated youth are significantly more likely to have a mental disorder than youth in the general population. *See* Seena Fazel et al., *Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys*, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1016 (2008); Christopher B. Forrest et al., *The Health Profile of Incarcerated Male Youths*, 105 Pediatrics 286, 289 (2000). Between 70 and 100 percent of "incarcerated youth meet [the] normal [diagnostic] criteria for at least one disorder," with "approximately 20% of youth meeting diagnostic criteria for a serious mental health disorder -- defined as serious emotional disturbance resulting in functional impairment." Candice L. Odgers et al., *Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles*, 14 Can. Child Adolescent Psych. Rev. 26, 27 (2005). By comparison, the prevalence of *any* disorder in the general youth population is approximately 1 in 3, with only 1 in 10 youth meeting the criteria for a serious disorder. *Id.* Mandatory life without parole sentencing prevents the sentencer from considering how a disability impacts the youth's overall culpability.

Specifically, Petitioner Jackson was a non-trigger person convicted of felony murder. Mandatory sentences of life without parole for a juvenile convicted of felony murder are particularly problematic. Because individuals with varying levels of intent and involvement can be convicted of felony murder, the level of moral culpability and appropriate sentence should involve a particularly individualized assessment. In death penalty cases involving adults convicted of felony murder, this Court has recognized the importance of individualized determinations, including the need to examine the offender's "intentions, expectations, and actions." *Enmund v. Florida*, 458 U.S. 782, 800 (1982). *See also id.* at 825 (O'Connor, J., dissenting) ("the intent-to-kill requirement . . . fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of a crime. Under these circumstances, the determination of the degree of blameworthiness is best left to the sentencer. . . .").[8]

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[8] Additionally, the failure to consider the juvenile's age or overall level of culpability in the mandatory sentencing of juveniles convicted of felony murder only compounds the sentence's unconstitutionality. Petitioner Jackson also presented evidence regarding his home and community environment, which was impoverished, violent and drug-laden. His biological father was absent and his mother's long-time boyfriend was physically abusive; and his mother, brother and several other relatives had been incarcerated. These facts support the conclusion that Jackson did not possess the same moral culpability as an adult when he committed a felony murder at age fourteen. Petition for Writ of Certiorari at 4-5,

Petitioner Miller presented a compelling life history, which supported the presumption that at fourteen he was less morally culpable than an adult. Miller was raised in a tumultuous household in which both parents were substance abusers. He was physically abused by his father. His parents separated when he was ten and he was moved to foster care. When he was just five, Miller attempted to hang himself; by age fourteen, Miller had attempted suicide at least five additional times. He began using drugs and alcohol by age eight, and at the time of the crime he was using prescription drugs, marijuana, and methamphetamines. *See* Petition for Writ of Certiorari at 4-5; *Miller v. State*, No. CR-06-0741, 2010 WL 33377692 (Ala. Crim. App. Aug. 27. 2010). His defense counsel proffered these facts to justify a sentence other than a capital sentence, but these factors were considered only with respect to the elements of the offense because of the mandatory sentencing scheme. In fact, the prosecution mocked evidence of Miller's youth:

> I guess that is the same argument about him being a kid and not responsible. He's not a kid. He's old enough to take a bat and beat somebody to death with it. He's not one of our kids either. I resent that. Parade him up here and try to get you to do something other than what needs to be done because he was fourteen at the time that this

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Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011). *See* Section III, *infra*.

> happened, he is seventeen now and he just doesn't have responsibility for it.

State v. Miller, Trial Tr. at 1320 [hereinafter Miller Tr.]; *see also id.* at 1323. Although these arguments may be constitutionally acceptable when there is discretion in sentencing, *see Eddings v. Oklahoma*, 455 U.S. 104 (1982), such arguments reveal rather than cure the constitutional problem in a mandatory life without parole scheme. To suggest that a sentencing decision should be made on the offenders' trial age rather than at the time of the offense both disregards and denigrates the constitutional principles underlying *Graham* and *Roper*.[9]

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[9] That a sentencer may view youth as a factor indicating increased, rather than diminished, culpability supports a categorical ban on juvenile life without parole sentences. As this Court found in *Roper*:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. . . . In some cases a defendant's youth may even be counted against him. In this very case . . . the prosecutor argued [the defendants'] youth was aggravating rather than mitigating.

543 U.S. at 572-73 (internal citation omitted). Because a sentencer may consider youth a "two-edged sword" – recognizing a youth's diminished capacity while simultaneously fearing that the juvenile's young age or troubled upbringing indicates a propensity to reoffend – an unacceptable risk exists that a sentencer will not properly account for a youth's diminished culpability in fashioning an appropriate sentence. *See Penry*, 492 U.S. at 324.

III. THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A JUVENILE WHO DID NOT KILL OR INTEND TO KILL IS IMPERMISSIBLE UNDER THE EIGHTH AMENDMENT

In *Graham*, this Court found that children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime. 130 S. Ct. at 2027. This Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* (emphasis added). *Graham*'s rationale applies equally to juveniles convicted of felony murder where there is no allegation or finding of fact that the youth killed or intended to kill.[10]

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[10] Felony murder was first codified in the United States in the nineteenth-century. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 Stan. L. Rev. 59, 64-65 (2004). Initially, felony murder was considered an aggravating factor that might justify the imposition of the death penalty – the fact that the killer had a "felonious motive" increased his overall culpability. Guyora Binder, *The Culpability of Felony Murder*, 83 Notre Dame L. Rev. 965, 978 (2008). The expansion of the felony murder doctrine to include accomplices who did not participate in the act of violence and did not engage in an inherently violent act was more a judicial than legislative expansion. In the twentieth century, courts expanded the scope of accomplice liability and imposed criminal liability even where the connection between the felony and the killing was tenuous. *Id.* at 980. Since felony murder legislation did not itself reflect the broad scope of the doctrine as currently applied, assessing legislative intent and national consensus is difficult.

Graham cited *Enmund v. Florida*, 458 U.S. 782 (1982), for the proposition that individuals who do not kill or intend to kill are categorically less deserving of the most serious forms of punishment than murderers. 130 S. Ct. at 2027. Enmund, like Petitioner Jackson, took part in a robbery in which another participant shot and killed the victims. *Enmund* held:

> For the purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

458 U.S. at 801. *Enmund* held that the death penalty "is an excessive penalty for the robber who, as such, does not take a human life." *Id.* at 797.

Similarly, the criminal culpability of a juvenile convicted of felony murder should be limited to the juvenile's personal participation in the underlying felony. With no finding that the juvenile either killed or intended to kill, the juvenile is no more culpable than a juvenile convicted of a nonhomicide felony.

Accordingly, sentencing such juveniles to life without parole is unconstitutional under *Graham*.[11]

A. The Rationale Behind Felony Murder Does Not Justify A Life Without Parole Sentence

The felony murder doctrine requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See, e.g., Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.") (internal quotation omitted). Felony murder is often justified by a "transferred intent" theory, where the intent to kill may be inferred from an individual's intent to commit the underlying felony since a "reasonable person" would know that death is a possible result of felonious activities. *See, e.g., Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (finding it proper to infer intent to kill from an intent to commit a felony because, pursuant to a "reasonable man" standard, the person engaged in a felony "knew or should have known that death might result from the felony"). The adult felony murder

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[11] *Graham* also cited *Tison v. Arizona*, 481 U.S. 137 (1987), which upheld the death penalty in an adult felony murder case, for the proposition that "'[t]he heart of the retribution rationale is that a criminal sentence *must be directly related to the personal culpability of the criminal offender*.'" *Graham*, 130 S. Ct. at 2028 (quoting *Tison*, 481 U.S. at 149) (emphasis added). Juveniles convicted of felony murder are less personally culpable than adults because of their age and immaturity.

doctrine is inconsistent with the developmental and neuroscientific research that has informed this Court's recent decisions involving juveniles. These decisions preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony – even a dangerous felony – as the law ascribes to an adult. *See J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).

1. Juveniles' Decision-Making And Risk-Assessment Are Less Developed Than Adults'

Adolescents' risk assessment and decision-making capacities differ from those of adults in ways that are particularly relevant in cases of felony murder. This Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008) [hereinafter Scott & Steinberg, *Adolescent Development*] ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.").

Adolescents are also less likely to perceive risks and are less risk-averse than adults. Scott & Steinberg, *Adolescent Development*, at 21. In the

criminal sentencing context, this Court has recognized that adolescents' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Graham*, 130 S. Ct. at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, this Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 130 S. Ct. at 2032. *See also* Scott & Steinberg, *Adolescent Development*, at 20. Adolescents are less likely than adults to assess and weigh the risk that someone might get hurt or killed in the course of the felony. Because an adolescent who participates in a felony is less likely to foresee or account for the possibility of death in the course of that felony, a life without possibility of parole sentence is not proportionate to the juvenile's culpability in felony murder cases. *Cf. Tison*, 481 U.S. at 157-58. Accordingly, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.

2. Juveniles Are Particularly Vulnerable To Negative Influences And Outside Pressures

"[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.* Research confirms the common perception that adolescents are highly susceptible to peer pressure. Scott and Steinberg,

Adolescent Development, at 21. In particular, because certain criminal behaviors can heighten status among adolescent peers, youth may face peer pressure to engage in criminal activities that they would otherwise avoid. *Id.* at 20-21.

The influence of peers may be especially significant in felony murder cases, in which there are always accomplices. As with Petitioner Jackson, the youth may make a spur-of-the-moment decision to participate in the felony, perhaps out of fear of social rejection or loss in social status if he refuses. *Id.* at 22. An adolescent participating in a felony is driven more by pressures, impulses and emotion than careful assessment of the risks to himself or others. *Id.*[12] It is unreasonable to infer that that a juvenile had an intent to kill merely based on the juvenile's decision to engage in a felony.

B. Juvenile Life Without Parole Sentences For Felony Murder Serve No Penological Purpose

"A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028. *Graham* held that none of the penological goals of retribution, deterrence, incapacitation, or rehabilitation justified

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[12] Similarly, Petitioner Miller's capital murder conviction relied on the fact that the murder was committed during the course of an arson. *Miller v. State*, 63 So. 3d 676. 683 (Ala. Crim. App. 2010). For the reasons noted above, his actions do not necessarily manifest an intent to kill or an indifference to the value of human life.

a life without parole sentence for a juvenile convicted of a nonhomicide offense. *Id.* at 2028-30. Similarly, none of these penological goals justifies a life without parole sentence on a juvenile convicted of felony murder.

Retribution does not justify a life without parole sentence for a juvenile convicted of felony murder. First, because of juveniles' diminished culpability, "the case for retribution is not as strong [a penological justification] with a minor as with an adult." *Roper*, 543 U.S. at 571. Second, the culpability of an individual convicted of felony murder must be based upon the individual's own conduct and not upon the murder committed by others involved in the felony. *See Enmund*, 458 U.S. at 798 ("The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims."). Because the culpability of a juvenile is based on his own actions – not the resulting harm – where a juvenile convicted of felony murder did not kill or intend to kill, his culpability is no different from a juvenile convicted of a nonhomicide felony.[13] As in *Graham*, retribution cannot justify a life without parole sentence.

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[13] This Court has held that the death penalty can be imposed on an adult convicted of felony murder where the adult was a major participant in the crime and was recklessly indifferent to human life. *Tison*, 481 U.S. at 152. In *Roper* and *Graham*, this Court recognized that youth generally are more reckless than adults, which can result in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2028. An adolescent's recklessness is not a manifestation of his indifference to human life so much as a reflection of his immaturity and impulsiveness.

Deterrence also fails to justify a life without parole sentence for juveniles convicted of felony murder. In *Enmund*, an adult death penalty case, this Court was "quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." 458 U.S. at 798-99. The Court found that "competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." *Id.* at 799. Deterrence is an inappropriate rationale because, "if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious, felony murder will not 'enter into the cold calculus that precedes the decision to act.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

Deterrence is an even less compelling rationale for juveniles. Juveniles "are less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 S. Ct. at 2028-29. This Court has questioned whether the prospect of even the death penalty would have "a significant or even measurable deterrent effect on juveniles." *Roper*, 543 U.S. at 571. "[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.*

Additionally, *Graham*'s rejection of incapacitation or rehabilitation as a sentencing justification applies equally in felony murder cases. As to incapacitation, this Court found, "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 S. Ct. at 2029. Even expert psychologists cannot differentiate between offenders whose crimes are adolescence-limited and those rare juvenile offenders who will persist with their crimes into adulthood. *Id.* Rehabilitation likewise cannot justify the sentence, since by definition, the sentence "forswears altogether the rehabilitative ideal." *Id.* at 2030.

IV. THE HEIGHTENED RISK OF WRONGFUL CONVICTIONS WEIGHS AGAINST IMPOSING OF LIFE WITHOUT PAROLE SENTENCES ON JUVENILES

This Court struck down the death penalty for mentally retarded offenders because the heightened risk that mentally retarded defendants may falsely confess necessitates a sentence less severe than death. *See Atkins v. Virginia*, 536 at 320-21, n.25 (2002) (citing the increased risk "that the death penalty will be imposed in spite of factors [including the possibility of false confessions] which may call for a less severe penalty."). Like mentally retarded individuals, juveniles have an increased propensity to falsely confess. *See J.D.B.*, 131 S. Ct. at 2401 (the

risk of false confession is "all the more acute" when a juvenile is the subject of a custodial interrogation); *In re Gault*, 387 U.S. 1, 52 (1967) ("[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children").

Empirical studies have confirmed that juveniles are particularly likely to confess to crimes they never committed. *See* Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (wrongfully convicted teenagers and children were almost twice as likely to have falsely confessed than wrongfully convicted adults); Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004) (32% of individuals in a dataset of 125 false confessors were under eighteen); Samuel L. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544-45 (2005) (dataset of 340 exonerations revealed that juveniles were three times more likely to have falsely confessed than adults).[14] Indeed, even the leading interrogation training company, John E. Reid & Associates, has agreed that juveniles are at greater risk of falsely confessing and warn police to use "extreme caution and care" when interrogating them. John E. Reid & Associates, Inc., Critics

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[14] Laboratory studies have reached the same conclusion. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 150-51 (2003) (majority of juveniles between the ages of twelve and sixteen years old complied with a request to sign a false confession without a word of protest).

Corner: False and Coerced Confessions, http://www.reid.com/educational_info/criticfalseconf.html (last visited Jan. 5, 2012).

Additionally, the overwhelming majority of proven false confessions occur in murder cases that carry the severest sentences, suggesting that the risk of sentencing innocent youth to life without parole may be particularly high. Drizin & Leo, 82 N.C. L. Rev. at 946. Examples abound of the imposition of life without parole sentences on wrongfully convicted youth. *See, e.g.*, Center on Wrongful Convictions of Youth, Calvin Ollins, http://www.cwcy.org/exonereesViewDetail.aspx?id=12 (last visited Jan. 5, 2012); Innocence Project of Florida, Anthony Caravella, http://floridainnocence.org/content/?page_id=2000 (last visited Jan. 5, 2012) (Before his exoneration, Calvin Ollins served more than thirteen years for the murder and rape of a Chicago medical student he falsely confessed to committing when he was fourteen; before exoneration, Anthony Caravella served twenty-six years of his life sentence for a crime he falsely confessed to committing when he was fifteen).

False confessions from juveniles are also apt to result in convictions – even when the defendants are innocent. The *reliability* of confessions is not relevant at the transfer stage, and judges rarely screen out unreliable confessions before trial. *See* Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 Hastings L. J. 175, 189-90 (2009). During pre-trial

suppression hearings, judges are tasked only with considering the voluntariness – not the reliability – of inculpatory statements. *See Colorado v. Connelly*, 479 U.S. 157, 161 (1986) ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."). Once the trial commences, jurors give overwhelming weight to confession evidence. *See Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (confessions are "the most compelling possible evidence of guilt"); *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) ("[t]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous") (internal citations omitted). *Accord* Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469 (1997) (laboratory study concluding that confessions are "uniquely potent"); Drizin & Leo, 82 N.C. L. Rev. *supra* (finding that 81% of false confessors who took their cases to trial were wrongfully convicted). Upon conviction, false confessors will almost certainly be sentenced more harshly because their recantations are seen as a lack of remorse. *Id.* at 921.

The net result is that juveniles' "reduced capacity" increases their vulnerability to giving false confessions when pressured by police. *See Atkins*, 536 U.S. at 320-21. This, together with juvenile defendants' added difficulties trusting adults,

working with counsel, and fully appreciating the impact of court procedures all combine to make it more, rather than less, likely that they will receive a wrongfully imposed sentence of life without parole.

In sum, the increased risk that juveniles may falsely confess, coupled with the fact the sentencer will not consider their heightened risk of falsely confessing when imposing life without parole, further supports a categorical bar on sentences of life without parole for juveniles.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court adopt a categorical ban on sentences of life without parole for all juveniles under the age of eighteen.

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Miller v. Alabama and Jackson v. Hobbs

Identity of *Amici* and Statements of Interest

APPENDIX

ORGANIZATIONS

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Alabama Fair Sentencing of Children is a grass roots effort in Alabama working to abolish juvenile life without parole. On May 6, 2009, a bill that would affect our children serving Life and Life Without Parole was introduced in the House of

Representatives by Bobby Scot (D-VA) and John Conyers (D- MI). The name of the bill is HR 2289, the Juvenile Justice Accountability and Improvement Act of 2009. We are working with the coordinating efforts of the National for the Fair Sentencing of Children in Washington, DC to end life without parole, the death sentence in prison, by advocating the passage of this crucial legislation.

The **Barton Child Law & Policy Clinic** is a clinical program of Emory Law School dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center's children's rights agenda is based on the belief that policy and law should be informed by research and that legal service to children and families need to be holistic. That basis recognizes that children should be viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk. The Barton Center adopts an interdisciplinary, collaborative approach to achieving justice for youth.

The Barton Center was founded in March 2000 and has engaged in the legal representation of juveniles in delinquency cases since the summer of 2001. In 2010 the Barton Center added an appellate representation dimension through its Appeal for Youth Clinic, which seeks systemic reform through

the holistic appellate representation of offenders in our juvenile and criminal justice systems.

The **Campaign for the Fair Sentencing of Youth** (CFSY) is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators—on both state and national levels—to accomplish our goal.

The **Campaign for Youth Justice** (CFYJ) is a national organization created to provide a voice for youth prosecuted in the adult criminal justice system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system. CFYJ

raises awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the unique needs of youth prosecuted in the adult system.

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The Center for Children's Advocacy (CCA) is a non-profit organization based at the University of Connecticut Law School and is dedicated to the

promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify

and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Center for Public Representation**, a national public interest law firm with its main office in Northampton, Massachusetts, has represented children and adults with disabilities for nearly forty years. Because a high percentage of individuals in the juvenile and adult correctional systems have mental disabilities, their representation is among the Center's highest priorities. The Center's advocacy efforts have included creating alternatives to incarceration, improving conditions of incarceration and promoting release to appropriate and effective community-based programs.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The **Chicago Lawyers' Committee for Civil Rights Under Law, Inc.** is the public interest law consortium of Chicago's leading law firms. The Chicago Lawyers' Committee was established in 1969 by a group of local attorneys to provide quality legal counsel to those clients whose civil rights cases and projects would benefit the community at large. The mission of the Chicago Lawyers' Committee is to promote and protect civil rights, particularly the civil rights of poor, minority, and disadvantaged people in the social, economic, and political systems of our

nation. Problems of high rates of incarceration are a special concern of the Chicago Lawyers' Committee, particularly as those high rates of incarceration adversely effect minority communities. The Lawyers' Committee has recently created an incarceration project devoted to advancing means of reducing levels of incarceration. The Chicago Lawyers' Committee has a special interest in working against those circumstances in which individuals are sentenced in terms of life in prison without the possibility of parole.

The Child Welfare League of America (CWLA) is a coalition of hundreds of private and public child and family service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development and advancement of national standards of care, quality programming, best practices and policies, and collaborative strategies that result in better outcomes for vulnerable children, youth, and families. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA standards of care for youth recognize that children and adolescents and especially those involved with child welfare and delinquency systems need support that is developmentally and age appropriate. Research shows children and adolescents have less

capacity than adults to take care of themselves and make good decisions. Therefore we advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The Children and Family Justice Center (CFJC) is a comprehensive children's law center that has represented young people in conflict with the law and advocated for policy change for over 20 years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, immigration/asylum and fair sentencing practices, the CFJC also collaborates with community members and other advocacy organizations to develop fair and effective strategies for systems reform. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students; they are assisted in their work by the CFJC's fellows, social workers, staff and students.

The Children & Youth Law Clinic (CYLC) is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law established in 1995. The CYLC serves the legal needs of children and adolescents in abuse and neglect, delinquency, criminal justice, health care,

mental health, disability, independent living, education, immigration and general civil legal matters. The CYLC participates in interdisciplinary research, provides training and technical assistance for lawyers, judges, and other professionals, and produces scholarship and practice materials on the legal needs of children. We have appeared as amicus curiae in numerous federal and state court cases implicating significant due process and therapeutic interests of children in criminal and juvenile justice proceedings.

The CYLC has pioneered the use of "therapeutic jurisprudence" in its advocacy for children in delinquency, criminal, school discipline, dependency, mental health, and other court proceedings. Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. We believe that courts should recognize the unique developmental characteristics of children, including their immature decision-making abilities, susceptibility to negative external influences, and capability for reform, should assure their fair treatment, and promote their best interests in all legal proceedings where their interests are adjudicated.

The Children's Law Center, Inc. in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The

Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Children's Law Center of Los Angeles (CLC) is a non-profit public interest law corporation that receives appointments from the Los Angeles County and the Sacramento County dependency courts to serve as counsel for abused and neglected youth. CLC serves as counsel for the vast majority of youth under the jurisdiction of Los Angeles and Sacramento counties. It has been providing children with representation for twenty years, and serves a greater number of children than any other such organization in the country. CLC is also actively engaged in local, statewide and national legislative and other reform efforts.

Founded in 1977, the Children's Law Center of Massachusetts (CLCM) is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth Further, the CLCM is committed to assuring children's age and developmental factors are considered by decision makers when imposing policies or penalties that impact children's lives. This case presents questions

of significance both to the children who are involved in the justice system and to the attorneys who represent them. The *amici* hope their views will add to the Court's consideration of the issues raised in this appeal.

The Child Welfare League of America (CWLA) is an 89-year-old association of more than 600 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA knows that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The *Civitas* ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The Colorado Juvenile Defender Coalition (CJDC) is a non-profit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. A primary focus of CJDC is to reduce the prosecution of children in adult criminal court, remove children from adult jails, and reform harsh prison sentencing laws through litigation, legislative advocacy, and community engagement. CJDC works to ensure all children accused of crimes receive effective assistance of counsel by providing legal trainings and resources to attorneys. CJDC also conducts nonpartisan research and educational policy campaigns to ensure children and youth are constitutionally protected and treated in developmentally appropriate procedures and settings. Our advocacy efforts include the voices of affected families and incarcerated children.

The Defender Association of Philadelphia is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant defendants represents clients in adult and juvenile, state and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is the only sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences has been challenged at the trial level and at the appellate level by Defender Association lawyers.

The Disability Rights Legal Center (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with

Disabilities Education Improvement Act and other federal and state laws. Its mission is to champion the rights of people with disabilities through education, advocacy and litigation. The DRLC is a recognized expert in the field of disability rights, and regularly files amicus briefs in state and federal courts, and is involved in policy-making activities on behalf of persons with disabilities both statewide and nationally. For example, DRLC filed an amicus brief on the merits at the United States Supreme Court in the cases of *Cullen v. Pinholster*, 131 S.Ct. 1388 U.S. (2011), addressing the impact of disability on the death penalty phase of a criminal matter, and *Graham v. Florida*, 130 S.Ct. 2011 (2010), on the issue of whether disability should be considered in charging and sentencing of minor youths charged as adults. DRLC also filed an amicus brief on the merits at the United States Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 129 S. Ct. 2484 (2009), on the issue of whether the Individuals with Disabilities Education Act allows reimbursement for private school placement without prior receipt of special education service, and in *Goodman v. Georgia*, 126 S. Ct. 877 (2005), a case addressing the issue of whether Congress properly abrogated state sovereign immunity when enacting Title II of the Americans with Disabilities Act.

The Education Law Center - PA is a public-interest organization dedicated to ensuring that all Pennsylvania children have access to a quality public education. ELC-PA has 35 years of experience addressing the educational needs of children, including many who have also been involved with the juvenile justice system. We seek to participate as

amicus in order to explain why, in our view, the fair treatment of children requires individualized consideration rather than the application of inflexible rules.

Families & Allies of Virginia's Youth (FAVY) is a diverse statewide organization that works to improve life outcomes for youth who are involved in — or who are at risk of being involved in — Virginia's justice systems. FAVY informs and supports families and youth who encounter the justice system. FAVY also advocates for justice system reforms, especially equitable, age-appropriate, and rehabilitative treatment of youth in the justice system. FAVY's membership includes people from throughout the commonwealth of Virginia — mostly family members of young people in the justice system, along with concerned community members and advocates.

Fight for Lifers, West is a Lifers Support Group in Western Pennsylvanian devoted to Prisoners in Pennsylvania who are sentenced to Life Imprisonment Without Parole. In the years since Roper, FFLW has identified 481 Juvenile Lifers in the PADOC, revealing that Pennsylvania leads the world in this category. We have sent 36 Newsletters, one every two months to these Juvenile Lifers, helping to make these prisoners aware of each other and giving important information to them. I this way they have shared information with each other, and made an impact of the outside world. FFLW has been seriously involved in the PA Senate Judiciary Committee Public Hearing on Juvenile Lifers, September 22, 2008, and in the United States House

Subcommittee on Crime and Terrorism and Homeland Security hearing on H.R. 2289-- Juvenile Justice Accountability and Improvement Act of 2009--, on June 9, 2009. FFLW was included in an Amicus Brief filed by the Juvenile Law Center in Graham v. Florida in 2009.

Florida's Children First ("FCF") is Florida's preeminent legal advocacy organization dedicated to the legal rights of children in the state's care and custody. Our mission is to advance the rights of at-risk children and youth. We seek full representation of children and youth and meaningful and sustainable improvement in Florida's child-serving systems. Our work is comprised of public policy development, executive branch monitoring, training and technical assistance, public awareness, and, where necessary, strategic litigation.

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law. Human Rights Watch has investigated life without parole sentences for youth in the United States since 2004. Its reports on this subject include *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (a 2005 report on juveniles sentenced to life without parole throughout the

United States); *Thrown Away* (a 2005 report on life without parole for juveniles in Colorado); and *When I Die They'll Send Me Home* (a 2008 report on life without parole for juveniles in California).

International CURE (Citizens United for Rehabilitation of Errants) is a grassroots prison reform organization that advocates for more rehabilitative opportunities for people incarcerated. These opportunities must especially be given to *all* juveniles. Life without parole sentences for juveniles in effect closes the door to rehabilitation by (1) providing no release no matter how much a person is rehabilitated and (2) transferring that person into the adult system.

The **Iowa Chapter** of **Citizens United for the Rehabilitation of Errants (CURE)** was established in 1992 and is a member organization of International CURE. We are committed to working for justice and protection of human rights within our criminal justice system. We believe that children should be treated and processed within the juvenile justice system rather than in the adult courts. We believe that the justice system should recognize developmental differences between adults and children. We also believe that it is cruel and unusual treatment to sentence children to a sentence of life without parole which denies them the opportunity for rehabilitation and redemption.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair,

humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice.

JustChildren, a project of the Legal Aid Justice Center, with offices in Charlottesville, Richmond, and Petersburg, is Virginia's largest children's law program. We work to reform Virginia's juvenile justice system in such areas as access to counsel, conditions of confinement, juvenile reentry, and juvenile transfer. JustChildren's goal is to keep more children in school, off the streets, and out of courts and prisons. In 2005, we helped to pass a law requiring counsel for youth at their initial detention hearings. We currently lead a statewide legislative campaign to reduce the number of youth who are tried and sentenced as adults. JustChildren also represents youth in juvenile prisons seeking access to more appropriate services and youth tried as adults, who have blended sentences of juvenile and adult time, to obtain reduction or elimination of the adult time. Working with these youth, many of whom have been convicted of serious felonies, we see how rehabilitation can transform a youth's behavior and attitude. Boys and girls involved in extensive dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the

Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

The Juvenile and Special Education Law Clinic (JSELC) is one of eight clinics at the U.D.C. David A. Clarke School of Law. JSELC faculty and student attorneys represent children and parents (or guardians) in Washington, DC primarily in special education and school discipline matters, with a focus of advocating on behalf of young people who also are enmeshed in the delinquency or criminal systems. JSELC protects and enforces students' and parents' (or guardians') rights in administrative hearings, as well as in local and federal court. JSELC has its roots in representing youth in the delinquency system. JSELC faculty pioneered a nationally-recognized approach of addressing delinquency problems by supplementing delinquency defense with, in appropriate cases, advocacy to address the education and special education needs of the children

who are the subject of those delinquency proceedings. By arranging for young people to receive needed special education services, JSELC professors and law students ensure that delinquency system judges, probation officers, and others respond appropriately to the children's needs for care and rehabilitation. As a consequence, JSELC faculty and the clinic are often able to protect children from punitive responses or to extricate children from the delinquency system altogether.

Juvenile Justice Initiative (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and identify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The Juvenile Rights Advocacy Project (JRAP) is curricular law clinic, based at Boston College Law School since 1995. JRAP represents youth, with a focus on girls, who are in the delinquency or status offense systems, across systems and until the youth reach majority. JRAP attorneys use legal system to access social services and community supports for youth, hold systems accountable, and reduce the use of incarceration. JRAP also conducts research and policy advocacy for youth in the justice system. Among its work, JRAP

seeks to develop and model programs for delinquent girls that reduce the use of incarceration and detention, and prompt systems to work collaboratively to shore up community resources supporting youth.

The Kids First Law Center is a nonprofit public interest organization for children in Cedar Rapids, Iowa. Kids First opened in January 2005 and provides free legal counsel to children in high-conflict custody and divorce cases. Kids First focuses on the needs and rights of children placed in the middle of conflict. The organization strives to make children's voices heard in the court system. We believe judges and attorneys should seek to understand situations from the child's perspective. Because of their developmental stages and comprehension abilities, children should be treated differently than adults in the court system.

Loyola Law School Center for Juvenile Law and Policy (CJLP) is an organization dedicated to reforming the Los Angeles juvenile justice system through research, activism, and advocacy. Through direct client representation, community involvement, and policy research and advocacy, the Center provides a voice for children and families involved in the Juvenile Justice System, and a point of convergence for students, faculty, stakeholders, and community members dedicated to the creation of a more humane and responsive justice system for children. CJLP has written and participated in numerous amicus briefs

The **Mid-Atlantic Juvenile Defender Center (MAJDC)** is one of nine regional centers created by the National Juvenile Defender Center in 2000. MAJDC is a multi-faceted juvenile defense resource center serving the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes policy development in the region through conducting state based assessments of access to counsel and quality of representation in delinquency proceedings. MAJDC also coordinates training programs for defenders, provides technical assistance and encourages the development of oversight and accountability in the justice system.

NAMI, the **National Alliance on Mental Illness**, is the nation's largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan. NAMI has long prioritized advocacy on behalf of youth with mental health disorders in criminal justice systems, many of whom have mental illnesses so severe that they interfere with daily functioning. We believe that it is cruel and inappropriate to sentence individuals who commit crimes while they are youth to life without parole and further believe that both age and mental health status must be strongly considered as mitigating factors in such cases.

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving the legal interest of children in state and federal appellate courts and the Supreme Court of the United States.

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals

include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 3000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The National Black Law Student Association (NBLSA) is a national organization formed to articulate and promote the needs and goals of black law students and effectuates change in the legal community. We are currently the largest student run organization in the United States with nearly 6,000 members. The NBLSA has a special interest in protecting youthful offenders in the

juvenile system. NBLSA created The Juvenile Education Advocacy Network ("J.E.A.N"). J.E.A.N targets youth at risk of obtaining juvenile records, and pairs these youths with local BLSA chapters that focus on juvenile delinquency prevention. In addition, NBLSA has initiated a community service program focused on criminal justice reform that addresses the needs of juveniles at every level. Such community service programs include Criminal Justice Reform; early prevention, successful reentry, and the incarcerated population.

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. As part of the organization's juvenile justice agenda, NCYL works to ensure that youth in trouble with the law are treated as adolescents and not

adults, in a manner that is consistent with their developmental stage and capacity to change.

The **National Family Network** (NFN) works to create a community of support for friends and family members of people impacted by violence committed by youth, in order to establish a strong, family-run, advocacy base. The NFN works to organize and mobilize family members and loved ones in order to engage in dialogue, advocacy, action planning, and information sharing to advance efforts to end the practice of sentencing youth to life in prison without the possibility of parole. We are the family and friends of those impacted by violence. We are focused on healing and restorative practices in place of extreme sentencing practices imposed on youth.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in

urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The mission of the National Juvenile Justice Network (NJJN) leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-one members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development

The New Jersey Institute for Social Justice (NJISJ) is a Newark-based non-partisan

research and advocacy organization dedicated to the advancement of New Jersey's urban areas and residents. NJISJ advances its agenda through policy-related research and analysis, development and implementation of model programs, advocacy efforts, operational partnerships with government, and public education. The Institute has a deep and longstanding commitment to juvenile justice. The Institute played a central role in bringing the Juvenile Detention Alternatives Initiative to New Jersey, where it is now statewide and has resulted in many thousands fewer pretrial detentions of juveniles, which have long term harmful effects, with no increase in either pretrial re-offense or court non-appearance rates. The Institute has served since its inception on the New Jersey Council for Juvenile Justice System Improvement, a body jointly established by the Acting Administrative Director of the New Jersey Courts and the Executive Director of the State Juvenile Justice Commission.

The mission of the North Carolina Office of the Juvenile Defender can be described in four parts: to provide services and support to defense attorneys, to evaluate the current system of representation and make recommendations as needed, to elevate the stature of juvenile delinquency representation, and to work with other juvenile justice actors to promote positive change in the juvenile justice system. The Office of the Juvenile Defender is interested in this case as it impacts the constitutional rights of juveniles, particularly those juveniles facing life sentences without the possibility of parole.

The Northeast Juvenile Defender Center is one of the nine Regional Centers affiliated with the National Juvenile Defender Center. The Center provides support to juvenile trial lawyers, appellate counsel, law school clinical programs and nonprofit law centers to ensure quality representation for children throughout Delaware, New Jersey, New York, and Pennsylvania by helping to compile and analyze juvenile indigent defense data, offering targeted, state-based training and technical assistance, and providing case support specifically designed for complex or high profile cases. The Center is dedicated to ensuring excellence in juvenile defense by building the juvenile defense bar's capacity to provide high quality representation to children throughout the region and promoting justice for all children through advocacy, education, and prevention.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and

advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

The **Pendulum Foundation** serves youth who are serving long prison sentences, particularly those serving life without parole. In our capacity as a 501c3, The Pendulum Foundation educates both the public and those former juveniles inside the prison system. We have been featured in local, regional, national and international media. We provide college scholarships, programs, books and support for our incarcerated young men and women. In our capacity as Pendulum Juvenile Justice, a 501c4, we worked with the Colorado legislature to lower life without parole sentences for juveniles, soften direct file

statutes and create the first juvenile clemency board in the United States

For 225 years the **Pennsylvania Prison Society** has advocated for a restorative and constructive correctional system – one that is rooted in fairness and premised on society's needs to hold offenders accountable for their offenses and to aim to make them less likely to commit additional crimes once they are released. Sentences of life without parole strip away all hope of transformation and are, therefore, fundamentally inhumane as well as excessively cruel. Imposing such a terminal sentence on a child is additionally unfair in failing to take into account the diminished mental and emotional capacities of youthful offenders.

The **Public Defender Service for the District of Columbia** (PDS) is a federally funded, independent public defender organization; for 50 years, PDS has provided quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia justice system. PDS provides legal representation to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS also represents classes of youth, including a class consisting of children committed to the custody of the District of Columbia through the delinquency system.

Based in one of our nation's poorest cities, the **Rutgers School of Law – Camden Children's Justice Clinic** is a holistic lawyering program using multiple strategies and interdisciplinary approaches

to resolve problems for indigent facing juvenile delinquency charges, primarily providing legal representation in juvenile court hearings. While receiving representation in juvenile court and administrative hearings, clients are exposed to new conflict resolution strategies and be educated about their rights and the implications of their involvement in the juvenile justice system. This exposure assists young clients in extricating themselves from destructive behavior patterns, widen their horizons and build more hopeful futures for themselves, their families and their communities. Additionally, the Clinic works with both local and state leaders on improving the representation and treatment of at-risk children in Camden and throughout the state.

Rutgers Urban Legal Clinic (ULC), The ULC is a clinical program of Rutgers Law School – Newark, established more than thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of out-of-state organizations on a range of juvenile justice practice and policy issues. The ULC is a team leader of the New Jersey Juvenile Indigent Defense Action Network, an initiative of the John D. and

Catherine T. MacArthur Foundation that, among other efforts, seeks to provide post-dispositional legal representation to young people committed to the New Jersey Juvenile Justice Commission.

The **Sentencing Project** is a 25-year old national non-profit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate these problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Juvenile Defender Center** is one of nine regional centers created by the National Juvenile Defender Center (NJDC) to enhance the juvenile defense bar's capacity to provide high quality representation. The Southern Juvenile Defender Center offers technical assistance and advice to juvenile defenders, facilitates networking opportunities for juvenile defenders, conducts state and regional trainings and gathers and analyzes juvenile indigent defense data. The Southern Juvenile Defender Center is interested in this case as it impacts the constitutional rights of juveniles,

particularly those juveniles facing life sentences without the possibility of parole.

The **Support Center for Child Advocates** (*Child Advocates*), founded in 1977, is Philadelphia's volunteer lawyer program for abused and neglected children in Philadelphia, representing 800 children each year. For the children committed to *Child Advocates* care, lawyers and social workers advocate to ensure safety, health, education, family, permanency and access to justice. Respected for diligent and effective advocacy through a "whole child" model of representation, *Child Advocates* moves both public systems to deliver entitled services and private systems to open their doors to needy children and their families. Like all young people, *Child Advocates'* clients have distinct physical, emotional and developmental needs, however, the added background of abuse and neglect further impacts their development and behavior. *Child Advocates* strives to make certain that the individual circumstances of its young clients are taken into consideration by the Courts, public agencies and other decision-makers in the child's life.

The **University of Michigan Law School Juvenile Justice Clinic** (JJC) is a live client clinic that represents juveniles charged with criminal and delinquent conduct in various courts in the State of Michigan. The JJC represents approximately 30 clients at any given time. Additionally, JJC students and faculty work on juvenile justice policy issues.

Voices for Georgia's Children is an independent, non-profit organization whose mission

is to substantially improve outcomes for Georgia's children by engaging lawmakers and the public into building a sustained, comprehensive, long-term agenda to impact the lives of our kids in five distinct areas: health, safety, education, connectedness and employability. Through advocacy, original research and analysis, Voices assists leaders and citizens of Georgia in making sound decisions on policy, investment and systems that serve children and youth.

The W. Haywood Burns Institute (BI) is a San Francisco-based national nonprofit organization with a mission to protect and improve the lives of youth of color, poor youth and the well-being of their communities by reducing the adverse impacts of public and private youth-serving systems to ensure fairness and equity throughout the juvenile justice system. BI works with local juvenile justice systems to reduce racial and ethnic disparities in the juvenile justice system. Using a data driven, consensus based approach, BI works in sites across the country to bring officials from law enforcement, legal systems and child welfare together with community leaders, parents and children to change policies, procedures and practices that result in the detention of low-offending youth of color and poor youth. In addition, through the Community Justice Network for Youth, BI supports local organizations to build their capacity to hold local juvenile justice systems accountable, reduce the overuse of detention, and promote the use of community alternatives to detention. The BI has worked in more than 40 jurisdictions nationally and achieved significant results in reducing racial and ethnic disparities.

The Wisconsin Council on Children and Families (WCCF) was established in 1881 and has continued to the present time, through research, policy analysis, and education to promote policies and investments to ensure that all children grow up in safe, healthy, and nurturing families and communities. As a multi-issue advocacy organization, WCCF has been engaged in promoting policies that ensure youthful offenders receive effective developmentally appropriate responses and interventions at all stages of the juvenile and criminal justice system. WCCF has been particularly active in promoting policies that ensure youth are not treated as adults and that the unique developmental differences between adults and juveniles are attended to. WCCF believes, based on sound research, that use of developmentally appropriate interventions for youthful offenders accomplishes both the primary goals of the justice system, namely reducing the likelihood of further community harm and promoting the youth's success in becoming a productive member of our community.

Youth Advocate Programs, Inc. (YAP) is a non-profit, direct services organization founded in 1975. Our mission is to provide individuals who are, have been or may be subject to compulsory care with the opportunity to develop, contribute and be valued as assets so that communities have safe, proven effective and economical alternatives to institutional placement. Our philosophy stems from the premise that every individual and family has strengths and capabilities that can and must be developed. Our core agency principles guide this premise into practice and the principles reflect the agency's

ongoing commitment to family-focused programming that empowers youth and families to lead healthy, safe and productive lives in their communities. We recognize that strong families make strong communities and strong children, and oppose the incarceration of youth. YAP serves over 12,000 youth and families per year, specializing in youth who are typically rejected by government and other service providers because they present the most challenging cases. The agency provides child welfare, mental health and juvenile justice systems with cost-effective alternatives to residential, correctional and other out-of-home placements.

The Youth Law Center is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent

development, and have recently authored a law review article on juvenile competence to stand trial. The imposition of life without parole sentences upon fourteen year-olds is an issue that fits squarely within the Center's long-term interests.

INDIVIDUALS

Mary Berkheiser is a Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Professor's Berkheiser's area of specialization is juvenile law and the rights of juveniles accused of committing crimes. Professor Berkheiser directs the Juvenile Justice Clinic in the law school's Thomas & Mack Legal Clinic and teaches Criminal Law and Criminal Procedure - Adjudication. In the clinic, law students are certified to practice law before the courts of the State of Nevada under the supervision of Professor Berkheiser. Those students represent juveniles in proceedings in the juvenile and state district courts, advocating for their legal rights and their expressed interests. In addition, Professor Berkheiser and her students have drafted legislation and testified at legislative hearings on matters affecting juveniles in the State of Nevada. Professor Berkheiser is the co-director of the Western Juvenile Defender Center and a member of the Clark County Juvenile Justice Administration's Juvenile Detention Alternatives Initiative (JDAI) team and of the JDAI Girls Initiative Workgroup. Professor Berkheiser has authored two articles on juvenile issues – *Capitalizing Adolescence: Juvenile Offenders on*

Death Row, 59 Miami L. Rev. 135 (2005), and *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002) – and is at work on a third article that critiques juvenile plea bargaining.

Shay Bilchik is the founder and Director of the Center for Juvenile Justice Reform at Georgetown University Public Policy Institute. The Center's purpose is to focus the nation public agency leaders, across systems of care and levels of government, on the key components of a strong juvenile justice reform agenda. This work is carried out through the dissemination of papers on key topics, the sponsorship of symposia, and a Certificate Program at Georgetown providing public agency leaders with opportunities for short, but intensive, periods of study. Prior to joining the Institute on March 1, 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America, a position he held from February of 2000. Shay led CWLA in its advocacy on behalf of children through his public speaking, testimony and published articles, as well as collaborative work with other organizations. He worked closely with the CWLA Board of Directors, staff, and its public and private agency members on issues impacting the well-being of children and families. In 2001, 2004, 2005 and 2006, he was named among The NonProfit Times Power and Influence Top 50 for making his mark in the public policy arena and championing child welfare issues. Prior to his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and

supported a balanced and multi-systems approach to attacking juvenile crime. Before coming to the nation's capital, Mr. Bilchik was an Assistant State Attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney. Mr. Bilchik earned his B.S. and J.D. degrees from the University of Florida. As a former prosecutor and U.S. Department of Justice official in charge of juvenile justice and delinquency prevention issues he has learned that overly punitive sentencing policies do not work to either make our communities safe or rehabilitate offenders. In fact, research on juvenile offending, sentencing of juveniles as adult offenders, and adolescent brain development teach us that these disproportionate responses actually exacerbate juvenile offending patterns. JLWOP is a prime example of this simplistic thinking and ineffective public policy - a policy that is not shared by any developed country in the world.

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is president of the board for the North Carolina Center on Actual Innocence and has been appointed

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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In the Supreme Court of the United States

EVAN MILLER, PETITIONER
v.
ALABAMA

KUNTRELL JACKSON, PETITIONER
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

ON WRITS OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA
AND
THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, EIGHTEEN (18) OTHER STATES, AND ONE (1) TERRITORY FOR RESPONDENTS

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QUESTIONS PRESENTED

Miller v. *Alabama*, No. 10-9646

1. Does the Eighth Amendment categorically bar governments from imposing life-without-parole sentences on persons who commit aggravated murder when they are 14 years old?

2. If the Eighth Amendment does not categorically bar governments from imposing life-without-parole sentences on these offenders, does it nevertheless require governments to exempt these offenders from statutes that, for the worst forms of murder, make life without parole the minimum sentence?

Jackson v. *Hobbs*, No. 10-9647

1. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender?

2. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender who was not the triggerman or shown to have intended the killing, but who acted with reckless indifference to human life?

3. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a mandatory life-without-parole sentence on a 14-year-old homicide offender?

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INTEREST OF *AMICI CURIAE*

As independent sovereigns, the states routinely exercise law enforcement authority, serving as the principal guardians of community safety. The vast majority of criminal prosecutions in this country occur in state court and under state sentencing laws. And, except as constrained by this Court's Eighth Amendment jurisprudence, the state legislatures generally are free to determine which punishment is most appropriate to vindicate justice, deter others from committing crime, and ensure that the perpetrator is unable to reoffend. This is the role of the states.

In determining whether a particular penalty violates the Eighth Amendment, this Court seeks to determine "whether there is a national consensus" against the practice at issue. *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010). The states have a manifest interest in this inquiry as it relates to the constitutionality of life-without-parole sentences for the country's most violent teenagers. Among the 50 states, 38 follow the federal practice of allowing those 14 years and older to be given life-without-parole sentences. In fact, 26 states make the punishment mandatory in at least some cases. As a result, this Court's imposition of a categorical ban would have the immediate effect of overturning federal law and the sentencing practices of more than three-quarters of the states. This Court should not casually set aside state sovereignty and sentencing authority, particularly in a controversial area that is still subject to considerable national dialogue and debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in this case are narrowly framed to address the constitutionality of life-without-parole (LWOP) sentences for teenage murderers.[1] But those issues raise additional questions of much broader jurisprudential significance to the states as co-equal sovereigns: Should this Court create yet another categorical rule that removes states' sovereign authority to determine the propriety of non-capital sentences? Does such categorical rulemaking reflect appropriate separation-of-powers and democratic policy-making principles? And does international law have any role to play in determining a "national" consensus of what is cruel and unusual?

The *amici* states answer those questions and advance the following distinct points in support of the State of Alabama and the State of Arkansas:

First, this Court has recognized that administration of the criminal justice system is one of the most basic sovereign prerogatives that states retain. This Court should be reluctant to create categorical rules that eliminate entirely the states' sovereign authority to establish certain sentencing practices.

Second, judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short a vigorous and democratic process that already is playing out in state legislatures. This democratic principle is bigger than the fact that three-quarters of the states currently follow the federal practice of

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[1] The term "murderers" includes accomplices to murders.

allowing LWOP sentences for teenage murderers. It recognizes that this Court disrupts the democratic process and deprives society of the opportunity to reach true "consensus" when it prematurely ends valuable public debate over this moral issue. This Court should not silence one side and declare the other the winner. Rather than reflecting democratic principles, such a ruling would stultify them.

Third, in evaluating "national" consensus, *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010), this Court should be extraordinarily cautious before looking to international law and trends, particularly when the United States as a whole has been a conscientious objector to those trends. While international-law principles may have a more vital role to play in other areas, their legitimacy is much weaker in an Eighth Amendment analysis. To the extent *Graham* and *Roper* v. *Simmons*, 543 U.S. 551 (2005), hold otherwise, they should not be extended to teenage murderers.

Fourth, the Court should be equally cautious about extending *Graham* to categorically ban term-of-years sentences in the context of a murder offense. Murder is different than property and other nonhomicide crimes. And notwithstanding broad stereotypes about teenage immaturity and impulsiveness, some teenage murders reflect such utter depravity of will that an LWOP sentence is the only appropriate punishment.

Finally, there is no "national consensus" that would justify a judicially-imposed ban on LWOP sentences for teenage murderers. Accordingly, the Court should exercise restraint until the public debate and democratic process have had an opportunity to take their course.

ARGUMENT

I. The Court should not lightly disturb the sovereign authority that states exercise over their discrete criminal-justice systems.

This Court frequently has recognized that "administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (citing *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). As a result, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and this Court will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201 (citing *Irvine* v. *California*, 347 U.S. 128, 134 (1954)).

On its face, this Court's insistence on a "national consensus" as a prerequisite to categorically prohibiting a particular sentencing practice, *Graham*, 130 S. Ct. at 2022, appears to embody the same sort of heightened concern for state sovereignty this Court historically has acknowledged when evaluating the constitutionality of state criminal-justice practices. But the actual *Graham* decision was less so.

The *Graham* opinion began by acknowledging that 37 states and the federal government had laws on their books that allowed LWOP sentences for nonhomicide teenage offenders in at least some circumstances. But the opinion's analysis then rejected the state-sovereign prerogative and judicially repealed those laws, perhaps failing to fully account for state sovereignty.

First, the *Graham* opinion examined actual sentencing practices in the various states and concluded that the relatively sparse use of LWOP sentences for nonhomicide teenage offenders revealed a "consensus" against the practice. 130 S. Ct. at 2026–27. There is another possible conclusion to draw from this fact. The then-existing state practice allowed those individuals closest to the facts of each unique case—prosecutors and judges—to determine the propriety of an LWOP sentence. The fact that a low number of teenage, nonhomicide crimes actually resulted in LWOP sentences did not necessarily demonstrate a disdain for such a practice. More likely, it proved that the system was working: prosecutors sought the highest, non-capital punishment available only in the most severe cases, when the sentence was justified. Proper deference to state sovereignty includes honoring this state and prosecutorial restraint.

Second, the *Graham* opinion recognized that choosing among the different goals of criminal punishment "is within a legislature's discretion." 130 S. Ct. at 2028 (citing *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). That recognition has both separation-of-powers and federalism components. At the time *Graham* was decided, 37 states had determined that LWOP sentences for nonhomicide teenage offenders satisfied the penal goals of retribution, deterrence, incapacitation, and rehabilitation. But the opinion essentially suggests that the legislatures abused their discretion in making that determination. *Id.* at 2028–30. As Respondents explain in their merits briefs, Alabama Br. 48–55, Arkansas Br. 25–36, these penal goals cut much differently in the context of teenage murderers, because there is a bright line "between

homicide and other serious violent offenses against the individual." *Graham*, 130 S. Ct. at 2027. Nonetheless, federalism principles suggest that state legislative judgments be accorded additional respect.

II. The Court should not cut short the democratic process that already is playing out in state capitals regarding the propriety of LWOP sentences for teenager murderers.

Wholly aside from protecting state sovereignty, this Court should be cautious, not precipitous, before recognizing a new constitutional right that wipes away existing state law. In other words, regardless of the Court's view of the propriety of LWOP sentences for teenage murderers, there are societal costs for moving too quickly.

Take the Court's decision in *Roper*. Now that the Court has definitively held that the juvenile death penalty always is unconstitutional, there will be no more public, democratic debate about the propriety of such a sentence. This will be true even if there is a sudden change in crime patterns and citizens believe that the death sentence would be appropriate. Even those who would have supported the death penalty will stop debating the issue in the statehouse and court of public opinion, because the Court has foreclosed any ability to effect change at the legislative level.

Depriving American citizens of the opportunity to have a public debate comes at a high cost. For example, if this Court holds that LWOP sentences for teenage murderers is unconstitutional, society will not have the opportunity to reach this Court's understanding of "justice" through public exchanges of information and

discussion. And short-circuiting the state legislative process before society has reached a true "consensus" is damaging, both to our democratic form of government and to this Court's institutional credibility.

It is possible to see that debate happening right now. States continue to reevaluate their sentencing schemes for teenage murderers, sometimes reducing punishment, but more often maintaining or enhancing sentence length. If societal views coalesce eventually around one side or the other of this issue, the democratic process—not the courts—can and will respond to that popular sentiment. Particularly when interpreting a constitutional amendment that is "consensus" based, it is appropriate to allow public debate and the marketplace of ideas to play their course.[2] A premature decision ossifies the debate, leaving those who hold the "disfavored" views on the matter frozen in place and effectively silenced.

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[2] This public discourse is certainly present in Michigan. Long ago, Michigan was the first English-speaking government in the world to abolish totally the death penalty. But Michigan's citizens, ravaged by juvenile violent crime, enhanced the sentence length for teenage murderers. An overly aggressive Eighth Amendment jurisprudence inhibits Michigan's ability to innovate and adjust to the changing needs of its citizens.

III. The Court should be cautious before using international law to shed light on "national" consensus.

Exactly 200 years ago, Chief Justice John Marshall observed that "All exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 136 (1812). Yet *Roper* and *Graham* both looked to the legal systems of other nations as evidence of what should be considered "cruel and unusual punishment." Regardless of the validity of using international law to understand other provisions of the U.S. Constitution, its use should be most circumscribed when discerning a "*national* consensus" as to the cruelness or unusualness of a state's sovereign sentencing practice. Indeed, this Court has never held that international law has that role. It has only said that international practice can confirm the Court's independent judgment about the cruel-and-unusual nature of a practice.[3]

The divergence between U.S. law and that of the rest of the world reaches far beyond the punishment of teenagers. As but one of many examples, a German

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[3] Petitioners are wrong to assert that the United States is in "potential violation" of its obligations under international treaties. (Jackson Br. 51 n.66.) See Stimson & Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* 46–54 (Aug. 2009) (explaining that the United States is not a party to the Convention on the Rights of the Child, and that the International Covenant on Civil and Political Rights and the Convention Against Torture do not prohibit juvenile LWOP in the United States).

trial court recently convicted one of the 9/11 co-conspirators on over 3000 counts of accessory to murder. His sentence was 15 years, the maximum allowed under German law, which was reduced to only 7 years after an appeal and retrial.[4] Such a result for one of the most notorious acts of murder in the history of the United States would have sparked outrage here. There is no question that such a crime would have resulted in the death penalty in our nation. The result represents a fundamental disparity in notions of appropriate punishment.

A. Considering foreign policies distracts from the relevant Eighth Amendment considerations

The definition of "cruel and unusual punishment" is understood to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). The Court has therefore developed a two-prong test that considers both an objective evaluation of the national consensus and a subjective judicial consideration of whether the punishment is in accord with "the dignity of man." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976).

In this second prong, the Court is left to its own devices in deciding whether a punishment is excessive as the "maturing society" understands it. *Trop*, 356 U.S. at 101. The Court undoubtedly has broad latitude in coming to a conclusion on this subjective element.

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[4] Craig Whitlock, Friend of 9/11 Hijackers Convicted in Germany, Wash. Post, Aug. 20, 2005, at A12.

But foreign sources tell the Court little about whether a punishment exceeds what is acceptable for the United States penal system. Among other things, other nations, with different legal and moral traditions, may have chosen different penal goals.

Determining whether a teenage murderer is deserving of a particular term-of-years punishment is a highly context-specific process that does not necessarily span across legal systems. Younghjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. Pa. L. Rev. 63, 81 (Nov. 2007). There are multiple reasons why a punishment might be deemed "deserved" in one country but not in another. For instance, using the retributive theory of punishment, a certain crime may be considered a more serious violation in one country than another, requiring a greater payment to society. *Id.* at 80.

On the other hand, using the deterrence theory of punishment, the punishments might look different because one country has an inflated scale of imprisonment compared to another, requiring a comparatively greater punishment to effectively deter. *Ibid.* Since statistics alone cannot explain the penal theory behind a punishment or its harshness relative to other penalties, comparing American punishments to generalized statistics of foreign punishments does nothing to demonstrate whether or not a certain punishment is excessive. After all, this analysis asks whether separating teenage murderers from society permanently is justified to protect the community or vindicate justice based on the gravity of murder, the most serious offense under law.

Examining foreign judgments also runs the risk of supplanting the actually relevant data gathered in the national consensus analysis. It was for this reason that Chief Justice Rehnquist rejected the recourse to foreign sovereigns entirely: "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." *Atkins* v. *Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (emphasis added).

B. Foreign governments have different policies and agendas that cannot be captured in sentencing data.

Academic articles often imply that foreign law is a unified whole that can be used to interpret the morality of United States sentencing practices. But by the very nature of their history and cultures, other nations have laws that reflect different understandings of justice, even on continents considered most similar to our own in morals and culture.

For instance, American law's view of individual rights is grounded in popular democracy, sovereignty, and written constitutions. In stark contrast, European constitutionalism and the international notion of human rights are based on "principles that derive their authority from sources outside of or prior to national democratic processes." Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1999 (2004). Since foreign governments are not guaranteed to value the same rights and privileges as the United States, they cannot be counted on as providing examples of the "evolving standards of decency"

necessary for Eighth Amendment analysis. *Trop*, 356 U.S. at 101.

If we do choose to look to foreign nations as examples for our system of punishment, there is the further problem of which nations to choose. But when we stratify foreign countries by maximum allowable juvenile sentence, it is clear that there is very little international consensus on how much punishment is too much. Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39–48 (Oct. 2010) (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty – Comparative Aspects, Juvenile Justice Systems in Europe – Current Situation and Reform Developments* 1772 (2010)). In 2010, maximum youth sentences in Europe ranged from life imprisonment with the possibility of parole in the Netherlands, Scotland, and England to 20 years imprisonment in Greece and Romania, to just three years imprisonment in Portugal. *Id.* When the European community differs so greatly in its concept of what length of sentence is excessive, American courts are forced to cherry-pick which nations most represent American values and answer the subjective question of whether the United States is more like the Netherlands or more like Portugal.

The international test is even more problematic because American ideals on punishment sometimes evolve in the opposite direction of those in foreign nations. In recent years, several nations that once allowed LWOP sentences have outlawed them. Connie De La Vega & Michelle Leighton, *Sentencing our*

Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 996–1004 (2008). Meanwhile, in the United States, state legislatures consistently *increased* the severity of punishments for teenage offenders over the past 20 years. *Graham*, 130 S. Ct. at 2050 (Thomas, J. dissenting). During that time period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems *more* punitive." *Id.*, quoting 1999 DOJ National Report 89 (emphasis added). If state legislatures have unequivocally expressed their preference for a more punitive sentencing scheme for teenage offenders, it makes little sense to seek guidance from foreign legal systems that not do not share our history or institutions and consistently have moved in the opposite direction on this issue.

IV. The Court should decline to use a categorical ban on a term-of-years sentence involving the crime of murder.

Graham represented the first decision in the Court's history to declare "an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone." *Graham*, 130 S. Ct. at 1046 (Thomas, J. dissenting). Even in the context of nonhomicide teenage offenders, such an approach did not allow for states to conclude that the most reprehensible teenage offenders might warrant an LWOP sentence. See *id.* at 2041 (Roberts, C.J., concurring in the result) ("[W]hat about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? Or

Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son?"). Categorical sentencing bans eliminate the possibility that a particular sentence, such as LWOP, *ever* will be appropriate. Such a rule "is as unnecessary as it is unwise." *Id.*

The facts of countless teenage murderers demonstrate, in graphic fashion, why this Court should eschew the categorical approach in favor of a more nuanced, case-by-case determination. Despite the sociological evidence that teenagers, as a whole, can be impetuous and subject to peer pressure, it cannot be disputed that individual cases show a perversity of will, a moral culpability, and a propensity for recidivism that a categorical rule will never take into account. "Those under 18 years old may as a general matter have 'diminished' culpability relative to adults who commit the same crimes, but that does not mean that their culpability is always insufficient to justify a life sentence." *Graham*, 130 S. Ct. at 2041–42 (Roberts, C.J., concurring in part). Given that "specific cases are illustrative," *Graham*, 130 S. Ct. at 2031, consider the following examples, just from a single Michigan county:

- 14-year-old Calvin Hirsch and 15-year-old Donyelle Black pulled Wanda Sutherland, 39, from her car at gunpoint. They raped, robbed, and beat her, then shot her in the head and killed her, ignoring her many pleas for mercy. Black received a sentence of LWOP, but Hirsch pleaded guilty and was sentenced as a juvenile, serving only 5 years and released at 19. At age 23, he shot and killed Dora Lisa Shaw over a

$13 drug debt. This murder would have been averted had the LWOP sentence Hirsch received at 23 been imposed at age 14.[5]

- Barbara Hernandez, then 16, watched as her 20-year-old boyfriend slit a man's throat, then stabbed him 25 times so the couple could steal his car.[6]

- John Polick, 16-years-old, shined the flashlight on a 67-year-old woman while his older brother brutally beat her to death so the brothers could steal a television.[7]

- 15-year-old Christopher Dankovich stabbed his mother 111 times in their Rochester Hills home.[8]

- 17-year-old Michael Kvam raped and killed a woman, a teenager, and a little girl in Rochester Hills. The brutality of the crimes shook a local judge enough to change his stance on the death penalty.[9]

Finally, consider the case of Maurice Clemmons, a *former* teenage lifer in Arkansas. Clemmons was sentenced to 95 years without parole as a 17-year-old

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[5] Stephen Frye, *Human Rights: Children facing life*, Oakland Press (Nov. 13, 2005), available at http:www.axisoflogic.com /artman/publish/Article_19945.shtml.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

for robbery, burglary, theft, and bringing a gun to school. His sentence was commuted by the then-Arkansas Governor, "because of his age." At 2:45 a.m., four police officers were shot and killed in cold blood in a Seattle coffee shop.[10] These four officers would have been saved if the Arkansas Governor had preserved the LWOP sentence Clemmons received.

These are crimes committed by coldhearted murderers, not "children." To say that these brutal offenders are not culpable or not capable of recidivism is to ignore reality. See Lerner, Craig S., *Juvenile Criminal Responsibility: Can Malic Supply the Want of Years?*, 86 TULANE L. REV. 309 (2011). And downplaying teenage murder also ignores the plight of victims and their heartbroken families.

In sum, murder is different, as this Court tacitly acknowledged in upholding an LWOP sentence for a teenage murderer in *Roper*. Accordingly, the Court should limit *Graham*'s application to non-murder cases and otherwise restore harmony with the Court's pre-*Graham* appreciation of the special place of the death penalty in its Eighth Amendment jurisprudence. Such an approach also would align this Court's Eighth Amendment precedent with its recent cases in other juvenile-justice areas that reject categorical rules in favor of balancing tests that take many factors—including the defendant's age—under consideration. E.g., *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2408 (2011) (requiring a case-by-case analysis taking the

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[10] CNN, *Police, Suspect dead, had slain cop's gun* (Dec. 1, 2009), available at http://www.cnn.com/2009/CRIME/12/01/Washington.suspect.shot/; Nat'l Organization of Victims of Juvenile Lifers, *Dangerous Early Release*, available at http://www.teenkillers.org.

defendant's age into account in the *Miranda* custody analysis, rather than a "more easily administered" bright-line rule).

There is no reason to impose a categorical ban and overturn 38 state sentencing laws simply because it is a teenager, rather than an adult, who has committed the most heinous of crimes: the taking of a human life.

V. The Court should not categorically prohibit LWOP sentences for teenage murderers.

A. There is no "national consensus" regarding sentencing for teenage murderers.

Arkansas and Alabama correctly argue that there is no "national consensus" in favor of abolishing LWOP sentences for teenage murderers. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989)). And current state legislation (and its recent history) do not justify a categorical ban.

The notion of trying juveniles in adult court was rare until a steep rise in violent youth crime in the mid-1980s triggered a move toward harsher penalties and made adult sentences available to juveniles who commit the same crimes. Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, 14 (2005), http://www.hrw.org/en/node/11578/section/4 (last visited February 5, 2012). "By 1997, all states but three (Nebraska, New York, and Vermont) had

changed their laws to make it easier and more likely that child offenders would stand trial and be sentenced in adult criminal courts." *Id.*

Of the 44 states that now allow LWOP for homicides, 36 do so for offenders who commit their crimes before the age of 15. *Id.* Petitioners note that there are approximately 79 offenders serving LWOP in the United States for offenses committed at the age of 13 or 14. (Jackson Pet'r Br. at 47–48.) That number is almost certainly understated.[11]

Moreover, the number of under-15 teenage murderers serving LWOP sentences cannot logically be attributed to a consensus against such sentences, as Petitioners argue. Rather, the numbers reflect how few 13- and 14-year-olds commit the types of barbaric murder for which the states (and their prosecutors) have reserved the second-most-severe criminal punishment. States that allow but do not impose LWOP for teenage murderers—or only do so selectively in the most egregious cases—should not be treated as if they have expressed the view that the sentence is inappropriate.

In determining whether a particular sentencing practice is categorically "cruel and unusual" under the Eighth Amendment, the Court also considers "the

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[11] For example, Michigan understands that Miller's counsel has informed Alabama that its current estimate includes five such offenders in Michigan. But the Michigan Department of Corrections has informed the Attorney General's office that the correct number is actually seven. There is thus quite possibly substantial imprecision in the numbers Miller has offered to the Court.

culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 130 S. Ct at 2026 (internal citations omitted).

Petitioners argue that "every factor which the Court considered crucial for the results in *Roper* and *Graham* equally or more strongly compels the invalidation" of LWOP sentences for young teens who commit murder. Jackson Br. 8. Not so. Generalizations about teenagers are always dangerous. To suggest that there is not a single teenage murderer whose culpability, depravity of will, and risk of recidivism justifies an LWOP sentence defies credibility. As described above, there are certain teenage offenders whose horrific crimes warrant an LWOP sentence.

Finally, LWOP sentences for 14-year-old murderers do serve legitimate penological goals. An LWOP sentence is appropriate retribution for one who takes a human life, often in the most vicious, brutal, and inhumane ways possible, as the examples above demonstrate. "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim," such a sentence clearly is not disproportionate to a crime that causes such severe, irreparable harm to the victim, his or her family, and society. *Roper*, 543 U.S. at 571.

An LWOP sentence is also appropriate for deterrence. Even if such a sentence deters teenage murders "in a few cases," *Graham*, 130 S. Ct. at 2029, that means lives saved.

As for incapacitation, the *Graham* Court expressly recognized that, while it "may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Graham*, 130 S. Ct. at 2029. The Court continued by recognizing the potential for a "rare juvenile offender whose crime reflects irreparable corruption." *Id.* (quoting *Roper*, 543 U.S. at 572). Teenage murders provide precisely the context that is justified by the legitimate penological goal of incapacitation. The Court should not foreclose courts from imposing LWOP sentences for those rare offenders whose crimes do reflect "irreparable corruption."

In sum, LWOP sentences for juvenile homicide offenders are justified by at least three legitimate penological goals—retribution, deterrence, and incapacitation. As the Court reiterated in 2010, "Choosing among them is within a legislature's discretion." *Graham*, 130 S. Ct. at 2028 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). There is no basis to disturb the people's wisdom in exercising that discretion in 38 states and at the national level.

B. Petitioners' sentences are not grossly disproportionate to their offenses.

With the singular exception of *Graham*, the Court has used a case-by-case balancing test to analyze non-capital cases in evaluating Eighth Amendment challenges. The Court begins with a threshold inquiry "comparing the gravity of the offense and the severity of the sentence" to determine whether the punishment

is "grossly disproportionate for a particular defendant's crime." *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005) (opinion of Kennedy, J.)). In the "rare case" in which this threshold inquiry indicates "gross disproportionality," the court next "compare[s] the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.*

An LWOP sentence is undeniably a severe punishment to impose on any defendant, let alone a 14-year-old. But it is not disproportionately so with regard to Petitioners' offenses.

Petitioner Evan Miller and his 16-year-old co-defendant went to Miller's 52-year-old neighbor Cole Cannon's trailer with a plan to steal money from him. When an altercation ensued, Miller "climbed onto Cannon and began hitting him in the face with his fists," "picked up [a baseball] bat . . . and continued to attack Cannon by striking him with it repeatedly." Miller J.A. 133. He then told him, "I am God, I've come to take your life." After leaving briefly, the two returned to the trailer of their incapacitated victim and set several fires "to cover up the evidence." *Id.* Firefighters discovered Cannon's body in the burning trailer. Miller J.A. 134.

As the Wisconsin Supreme Court recognized in the post-*Graham* case of *State* v. *Ninham*, 797 N.W.2d 451, 475 (Wis. 2011), "[that the defendant] was just 14 years old at the time of the offense and suffered an indisputably difficult childhood does not . . . automatically remove his [LWOP] punishment out of the realm of the proportionate."

The case of Kuntrell Jackson presents a different situation, though one that remains similarly within the "realm of the proportionate." *Ninham*, 797 N.W.2d at 475. Jackson, aware that one of his two accomplices, Derrick Shields, "was carrying a sawed-off .410 gauge shotgun in his coat sleeve," proceeded with a plan to rob a neighborhood video store. When store clerk Laurie Troup repeatedly insisted she did not have any money and "mentioned something about calling the police, Shields shot her in the face," killing her. Jackson J.A. 84–85.

Jackson was convicted of capital murder and sentenced to LWOP after the trial court found that Troup's death occurred "under circumstances manifesting an extreme indifference to the value of human life" in the course of the aggravated robbery in which Jackson was involved. Jackson J.A. 85. While felony murder may present somewhat less dramatic scenarios than those in which the defendant is the "triggerman," an overwhelming majority of 46 states hold all co-conspirators liable for murder if a death results during the commission or attempted commission of a felony. *See* John Gramlich, *Should murder accomplices face execution?* (2008), http://www.stateline.org/live/details/story?contentId=333117.

It is not unreasonable to conclude that a person like Evan Miller, who can tell his victim—against whom he has no vendetta—that "I am God and I have come to take your life" while beating him with a baseball bat, poses the kind of risk that will never lessen with time. He is uniquely dangerous. And his crime is one that cries out for justice. The conclusion

that he has to forfeit his right to live in the community for the rest of his life is neither cruel nor unusual.

The same is true for Kuntrell Jackson. He assisted Derrick Shields in a robbery during which Shields coldly executed the store clerk, shooting her in the face with a shotgun, while she pleaded that she had no money. These are the gravest offenses against justice, reflecting an incorrigible indifference to human life. The State of Arkansas acts within its right by requiring that the perpetrators lose their right to live in society. Again, this is neither cruel nor unusual.

Miller and Jackson's crimes were pre-planned, brutal, and senseless. Their victims lost their lives, and the victims' families are forever changed. Miller and Jackson continue their lives in prison. The punishment of permanently removing them from society is not "grossly disproportionate," despite any lessened culpability the Court may attribute to them due to their age. Not being such "rare case[s]" in which this threshold inquiry indicates "gross disproportionality," the court need not proceed to the second step of the balancing analysis. *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)).

CONCLUSION

The judgments of the courts of appeal should be affirmed.

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v.
ALABAMA, *Respondent*.

KUNTRELL JACKSON, *Petitioner*,
v.
RAY HOBBS, Director,
Arkansas Department of Correction, *Respondent*.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals
and the Supreme Court of Arkansas

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, LATINOJUSTICE PRLDEF, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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STATEMENT OF INTEREST[1]

Amici curiae NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund, and Leadership Conference on Civil and Human Rights are non-profit organizations dedicated to, among other goals, eradicating the impact of race in the administration of justice. More details about individual amici are included in the Addendum.

SUMMARY OF ARGUMENT

The question presented by these cases is whether the imposition of a life without parole sentence on a fourteen-year-old child convicted of a homicide offense violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments. As detailed by the submissions of the Petitioners and their amici curiae, the answer is "yes." As this amicus brief explains, the improper influence of race impairs the culpability analyses of children subject to life without parole sentences, which is further evidence of the unconstitutionality of this sentencing practice. Although a proper evaluation of culpability is fundamental under the Eighth and Fourteenth Amendments, history shows

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the amici curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than the amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that racial stereotypes propelled the implementation of the laws that led to juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. This Court declared, in *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), that youth are less culpable than adults and, therefore, less deserving of life without parole sentences. Yet, it is clear that race critically and inappropriately influences the assessment of blameworthiness in the context of juvenile life without parole sentencing. Given this constitutional infirmity, as well as the severity and finality of a death-in-prison sentence, this Court should categorically exempt youth from life without parole sentences.

ARGUMENT

I. The Eighth Amendment Demands Fair Evaluation of Culpability.

In *Graham*, this Court held that children convicted of nonhomicide offenses were categorically barred from receiving life without parole sentences because, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 S. Ct. at 2027. Relying on a long line of death penalty precedents, *Graham*, for the first time, recognized that a non-death sentence was unconstitutional under the Eighth Amendment because a category of individuals – in that case, children who did not commit murder – were not sufficiently culpable for a life without parole sentence. *See id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Enmund v.*

Florida, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker v. Georgia*, 433 U.S. 584 (1977)); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (excluding children from death penalty because less culpable than adults); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (barring people with mental retardation from receiving death penalty because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," and mental retardation rendered offender less culpable).

That children are less culpable than adults, regardless of their offense, has been firmly established by this Court's holdings in *Graham* and *Roper*.[2] Notwithstanding the seriousness of the crimes at issue, youth homicide offenders have diminished culpability when compared to adult homicide offenders. Moreover, racial overtones and stereotyping tainted the widespread enactment of laws that exposed youth to life without parole, thus contributing significantly to the substantially disproportionate number of minority youth sentenced to juvenile life without parole. This improper influence of race in the sentencing of children to life without parole, therefore, raises serious concerns about whether such extreme sentences are imposed after a constitutionally defensible finding of the requisite level of culpability.

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[2] Indeed, this Court again recently recounted the stark range of differences between children and adults reflected in the lesser culpability of youth. *See J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 2403-05 (2011) (discussing well-established deficiencies of youth).

Race, of course, cannot – and should not – play any role in the imposition of criminal sanctions. Indeed, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Thus, this Court has consistently condemned the influence of race at all levels of the criminal justice system. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (race discrimination in use of peremptory strikes); *Turner v. Murray*, 476 U.S. 28 (1986) (juror's racial bias); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (race discrimination in grand jury selection); *Whitus v. Georgia*, 385 U.S. 545 (1967) (race discrimination in grand and petit jury selection); *Hernandez v. Texas*, 347 U.S. 475 (1954) (race discrimination against Mexican-Americans in petit jury selection); *Hill v. Texas*, 316 U.S. 400, 406 (1942) (race discrimination in grand jury selection). Yet, given the racial taint on juvenile life without parole sentencing, there can be no guarantee that children will receive a fair and proper consideration of their culpability. Race inhibits the mitigating value of youth, thereby impairing the evaluation of culpability that is necessary for a juvenile life without parole sentencing scheme to fall within constitutional bounds. Accordingly, life without parole sentencing for any criminal offense cannot safely be imposed on youth offenders without violating the Eighth Amendment.

II. Race Undermines the Evaluation of Culpability in the Sentencing of Children to Life Without Parole.

Over two decades ago, the pernicious influence of race helped to shape the public, political and legal

discourse on juvenile violent crime in the United States. The media, academics and legislators portrayed youth, and in particular youth of color, as exceedingly dangerous, violent and blameworthy.[3] The consistent connection between race, youth and criminal behavior undermined the widely accepted view, expressly affirmed in *Graham*, that youth are less culpable for their crimes than adults. *Graham*, 130 S. Ct. at 2026. In turn, these stereotypes were employed to justify the use of harsh punitive measures on criminally involved youth that had previously been limited to adult offenders.

A. Race Influenced the Implementation of Laws Allowing Children to be Sentenced to Life Without Parole.

For much of the 20th century, youthful offenders were subject to the jurisdiction of the juvenile court, a court that recognized that fundamental differences between children and adults warranted lesser punishments.

> The early reformers were appalled . . . by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child – essentially good, as they saw it – was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. . . .

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[3] This Court has recognized the role that false stereotypes about people of color can play in sentencing determinations in capital cases. *See Turner*, 476 U.S. at 35 (noting that "[m]ore subtle, less consciously held racial attitudes" such as fear of a particular racial group "could also influence" sentencing decisions).

> The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

In re Gault, 387 U.S. 1, 15-16 (1967) (alteration in original) (citations omitted).[4] Thus, "[t]he juvenile court combined the . . . conception of childhood with the . . . strategies of positive criminology to create a judicial-welfare alternative to the adult criminal process for juveniles." Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 Minn. L. Rev. 1447, 1458 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*]. Recognized as lacking maturity and fully formed personalities, children were removed from the adult process and subjected to intervention strategies to serve their best interests and prevent further criminal involvement. Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 Annals Am. Acad. Pol. & Soc. Sci. 10, 12 (1999). The state acted as *parens patriae* to ensure a youth's well-being. Distinctive terminology was employed in an "attempt to reduce the stigma attached to juvenile

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[4] *See also Kent v. United States*, 383 U.S. 541, 554-55 (1966) (describing juvenile court as "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct"); *McKiever v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) (highlighting the difference between the adult criminal system that accounts for adult culpability and punishes them accordingly, and the juvenile system that recognizes the lesser culpability of youth and works to rehabilitate young offenders).

court adjudications." Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 Geo. J. Legal Ethics 97, 110 (2011).[5] This Court secured children's constitutional protections in the juvenile court.[6]

The nature of the juvenile justice system changed significantly in the late 1980s and early to mid-1990s when our public discourse became "consumed by [a] looming threat posed by America's youth" and a predicted increase in violent juvenile crime. Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 Md. L. Rev. 849, 850-51 (2011). The rehabilitative norms that had characterized the juvenile justice system since its inception were dismantled through "the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts." Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from and Ideological Battleground*, 11 Fed. Sent'g Rep. 260 (1999). "Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was] . . . defined as

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[5] Specifically, "[c]harges are brought as 'petitions' instead of 'complaints' or 'indictments,' and 'trials' are called 'jurisdictional hearings.' Young offenders are referred to as 'minors' or 'delinquents,' not 'defendants' or 'criminals,' and convicted juvenile offenders receive 'dispositions,' rather than 'sentences.'" *Id.* (citations omitted).

[6] *See, e.g., McKiever*, 403 U.S. 528; *In re Gault*, 387 U.S. 1; *Kent*, 383 U.S. 541.

punishment or a period of incarceration . . . ."[7] Rather than dispositions based on the needs of a juvenile and rehabilitation, states focused on punitive sanctions for particular offenses.[8] "[P]unitive segregation – strategies to incapacitate and exclude young offenders rather than to change and reintegrate them" – were enacted. Feld, *Race, Politics and Juvenile Justice*, *supra*, at 1559.

This ideological shift was, in part, the product of a widespread legislative response to fluctuating crime rates among youth.[9] Critically, the response

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[7] Patricia Torbet, et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* xi (1996), *available at* http:// www. ncjrs. gov/ pdffiles / statresp.pdf.

[8] Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009) [hereinafter Beale, *Two Waves of Juvenile Justice*]; *see also* Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715, 721 (2002).

[9] Juvenile arrests for violence and homicide rose sharply at points between 1986 and 1994. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & Fam. Stud. 11, 29 (2007) [hereinafter Feld, *Unmitigated Punishment*]. However, those rates eventually fell in a consistently downward slope to the present day. *See* Alexia Cooper & Erica L. Smith, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* 4 (Nov. 2011), *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/htus8008.pdf (noting that "[a]fter 1993, the [homicide offending] rate fell so much that by 2000, the offending rate for teens was near its 1985 level"). A close examination of the statistics reveals that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s." Franklin E. Zimring, *The Youth Violence*

coincided with the deliberate reinforcement of a perceived link between race and teen crime. Throughout the late 1980s and early to mid-1990s, the media, academics and politicians consistently characterized teen crime in racially coded terms.[10] Efforts to explain teen crime conflated race, youth and criminal behavior. Youthful offenders, and in particular youth of color, were thought to pose a higher threat of violent criminal activity because of

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Epidemic: Myth or Reality, 33 Wake Forest L. Rev. 727, 728 (1998) [hereinafter Zimring, *Youth Violence Epidemic*]. Instead, the variations in the juvenile crime rates which occurred over short periods of time are explained by "narrower bands of behavior," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults. . . ." *Id.*

[10] Coded language consists of "symbols or phrases that indirectly implicate racial themes" without directly speaking to race. Feld, *Race, Politics, and Juvenile Justice*, *supra*, at 1553-55. It is used to "evoke modern racist sentiments without seeming racist or discriminatory [and] allows politicians to appeal to cultural archetypes in the collective unconscious about the 'alien other' who poses a fearful and menacing threat to society." *Id.* at 1553-54. As overt racism has become unacceptable, terms and phrases like tough on crime, urban, inner-city, gangs "and welfare now widely serve as 'coded' [words] that enable politicians to exploit" racial sensitivities "without explicitly playing the 'race card.'" *Id.* at 1554-55. For example, appeals to law and order, "first mobilized in the late 1950s," were used by "Southern governors and law enforcement officials to generate and mobilize . . . opposition to the Civil Rights Movement." Michele Alexander, *The New Jim Crow: Mass Incarceration In the Age of Colorblindness* 40 (2010). Such rhetoric, while appearing facially neutral, carries an implicit racial meaning, given its context and connection to race. *See also City of Memphis v. Greene*, 451 U.S. 100, 135-36 (1981) (Marshall, J., dissenting) (examining historical context and connection between language and race to interpret "code phrases for racial discrimination").

deficient personal traits – immorality, inherent proclivity for violence and remorselessness – rather than external factors like substance abuse, family dysfunction or criminal associations.[11] The proposed remedy, therefore, was to control and incapacitate youth through harsh punishment.[12] The onset of life without parole sentences for youth is the manifestation of those efforts.

1. The Media.

Both television and print media helped to create and reinforce the mythic connection between youth, race and criminality.[13] As crime rates varied in the

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[11] Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 712 (2002); George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 556 (1998).

[12] Increased punitive measures have been linked to racial typification, which is "the media's stereotypical portrayal of crime as a minority phenomenon." Sarah Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 458-61 (2006). In fact, "[w]hen minority offenders are stereotyped as particularly predatory or disposed to chronic criminal offending, they 'are seen as more villainous and therefore more deserving of severe penalties.'" Bridges & Steen, *supra*, at 555 (citations omitted).

[13] The news is a powerful influence that shapes public opinion. A 2000 poll found that 81% of people formed their beliefs about crime from the news, while 17% gained their beliefs through personal experience. Ernestine S. Gray, *The Media - Don't Believe the Hype*, 14 Stan. L. & Pol'y Rev. 45, 48 (2003). The news also "activate[s] and strengthen[s] linkages among certain racial categories, violent crime, and the fear and

late 1980s and early 1990s, some media began to cast youthful offenders as exceedingly violent, morally deficient and of color. Moriearty, *supra*, at 865-67. Even in the face of declining violent crime rates among juveniles,[14] media portrayals of children accused of crimes continued to carry "silent, racially charged messages," equating youthful criminal behavior with skin color. Rutherford, *supra*, at 720-21.

Thus, throughout the 1990s, youth of color were "overrepresented as perpetrators and underrepresented as victims in media crime stories." Moriearty, *supra*, at 870. The media described child offenders of that era as "'super predators,' 'youthful predators,' 'teen killers,' [and] 'young thugs,'" focusing almost exclusively on children of color. Robert E. Shepard, *How the Media Misrepresents Juvenile Policies*, 12 Crim. Just. 37, 38 (1998). In California, for example, "local news reports . . . feature[d] people of color as gang members or juvenile offenders." Beth Caldwell & Ellen C. Caldwell, *"Superpredators" and "Animals" – Images and California's "Get Tough on Crime" Initiatives*, 2011 J. Inst. Just. Int'l Stud. 61, 67 (2011). And "[a] survey of local television news in Los Angeles revealed that where the race of crime perpetrators was identifiable, nearly 70 percent were nonwhite males." Shepard, *supra*, at 38.

Across the country, portrayals of youth violence in visual and print media were "dominated by

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loathing such crime invokes." Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1563 (2005).

[14] *See supra* note 9.

pictures of African-American or Latino youngsters." *Id.* By 2000, a study of news broadcasts in six major U.S. cities found that "sixty-two percent of the stories involving Latino youth were about murder or attempted murder [although] . . . in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests." Moriearty, *supra*, at 871. A 2001 survey revealed that in the preceding decade, the media "misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime," such that whites were underrepresented and African-Americans and Latinos were overrepresented in depictions of perpetrators of violent crime. Lori Dorfman & Vincent Schiraldi, Building Blocks for Youth, *Off Balance: Youth Race & Crime in the News* 26 (2001), *available at* http://www.cclp.org/documents/BBY/offbalance.pdf. These faulty portrayals "reinforce[d] the erroneous notion that crime is rising, that it is primarily violent, that most criminals are nonwhite, and that most victims are White." *Id.*

The "Central Park Jogger" case – where five New York City teenagers were convicted of a crime they did not commit – is perhaps the most infamous example of the racialization of teen crime and its dangerous real-life consequences. In 1989, a young, white, female jogger was beaten, raped and left unconscious in Manhattan's Central Park by what police thought were as many as 12 youths. Craig Wolf, *Youths Rape and Beat Central Park Jogger*, N.Y. Times, Apr. 21, 1989, at B1. Five children, aged 14 to 16, were arrested and charged with rape, assault and attempted murder in connection with

the attack. David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. Times, Apr. 22, 1989, at 11. "All of the suspects were African-American or Latino." Moriearty, *supra*, at 862. The police attributed the attacks to "wilding," a term used by some of the young people brought in for questioning about the incident. *Id.* at 862-63; Pitt, *supra*, at 11. Although those arrested, tried and convicted for the attack were ultimately exonerated,[15] the term "wilding" captured the attention of the public and cemented the perceived link between race and teenage crime.[16]

> In New York City newspapers alone, the term "wilding" would appear 156 times in articles over the next eight years. . . . [I]ts racial connotations were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception

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[15] *See* Susan Saulny, *Convictions and Charges Voided In '89 Central Park Jogger Attack*, N.Y. Times, Dec. 20, 2002, at A1 (describing exoneration).

[16] Indeed, "[f]rom the moment the teenagers . . . were reported to have confessed, the horrific attack was transmogrified in public discourse into an issue of race." N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1348 (2004). The term "wilding" was used to connote a form of animalistic savagery reserved for criminally involved youth of color. *See id.* ("[T]he youths were alternately referred to as 'wolf packs,' 'rat packs,' 'savages,' and 'animals.'").

> of a single incident, each of the victims was described as a white female.

Moriearty, *supra*, at 863 (citations omitted). The intense media attention directed at "wilding" "contributed to a growing consensus that there was a new menace threatening society." Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 Youth & Soc'y 3, 10 (2002). "Wilding" was used exclusively to describe the criminal activity of African-Americans and Latinos, thus driving the connection between the race of the alleged perpetrators and their criminal behavior.

Thus, the media exaggerated representations of youth of color as perpetrators of violent crime. As detailed below, the media's racially-laden narrative about youth crime, further embraced and shaped by many academics and politicians, drove punitive measures to incapacitate youth while discounting their lesser culpability.

2. The Academics.

The media's false connection between race, crime and youth was corroborated and propelled by pseudo-scientific research documenting the impending rise of the so-called juvenile "super-predator." According to sociologists and criminologists at the time, these youth were a growing new breed of hyper-violent, morally-depraved and criminally-involved children who would terrorize society.[17] The super-predator myth,

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[17] *See, e.g.*, Peter Annin, *'Superpredators' Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial,

like "wilding" and other terms associated with the moral panic[18] over youth violence, relied heavily on "racist imagery and stereotypes" and harkened back to "historic representations of African Americans [and other people of color] as violence-prone, criminal and savage." Nunn, *supra*, at 712; Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081, 1083-84 (2001). Thus, to the extent that the super-predator myth contributed to the trend toward harsher sentences for young people, racial bias and stereotype were critical drivers of that momentum.

The term "super-predator" was first used by then-Princeton University Professor and criminologist John J. DiIulio, Jr. as part of his effort to explain

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Taming Teenage Wolf Packs, U.S. News & World Rep., Mar. 25, 1996, at 68; Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52; Maggie Gallagher, *Juvenile Crime Wave is Just Beginning*, Long Beach Press-Telegraph, May 20, 1996, at B7.

[18] "[M]oral panic over wilding reinforces racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class. Compounded by sensationalistic news coverage on wilding, along with carjacking, gang banging and other stylized forms of lawlessness associated with urban teens, minority youths remain a lightning rod for public fear, anger, and anxiety over impending social disorder, all of which contribute to additional law and order campaigns."

Welch, *supra*, at 4.

what he and other academics saw as the cause[19] and effect of variable rates of violent youth crime. DiIulio, *Super-Predators*, *supra*, at 1. As detailed by the Academic Amici, Professor DiIulio forecast an impending rash of youth crime and violence – a "demographic crime bomb." *Id.* He warned:

> On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . . [A]s long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.

Id. at 4.

Professor DiIulio's theory was based on predictions about population trends, crime rates and overt racial stereotypes. He cloaked crime data in

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[19] DiIulio explained that crime was rooted in what he identified as moral poverty, defined as the "poverty of being without loving, capable, responsible adult[ ]" role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings." John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 3, *available at* http://cooley.libarts.wsu.edu/schwartj/criminology/dilulio.pdf [hereinafter DiIulio, *Super-Predators*]. According to Professor DiIulio and his co-authors, moral poverty creates super-predators, who are more likely to be African-American children and other children of color, who have grown up in what they term "criminogenic communities." *See generally* William Bennett et. al., *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs* 22, 28 (1996).

racial terms, emphasizing the racial demographics of the predicted wave of juvenile criminals:

> The surge in violent youth crime has been most acute among black inner-city males. . . . Moreover, the violent crimes experienced by young black males tended to be more serious than those experienced by young white males . . . . In Los Angeles, there are now some 400 youth street gangs organized mainly along racial and ethnic lines: 200 Latino, 150 black, the rest white or Asian. In 1994, their known members alone committed 370 murders and over 3,300 felony assaults.

Id. at 2.

Professor DiIulio placed a racialized gloss on population trends to concluding that the mere growth in the population of youth of color would ensure greater numbers of so-called super-predators. He asserted that an increase in the number of young males in the U.S. population would "put an estimated 270,000 more young predators on the streets" by 2010, resulting in what he called a probable surge in the "number of young black criminals" as the "black crime rate, both black-on-black and black-on-white, is increasing." John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why Are So Many Blacks In Prison? Is the Criminal Justice System Racist? The Answer is Disquieting.*, City Journal, Spring 1996, at 1, *available at* http://www. city-journal.org/printable.php?id=62 [hereinafter DiIulio, *My Black Crime Problem*].[20]

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[20] Professor DiIulio was not alone in feeding the racial criminalization of youth and the public perception of an

Professor DiIulio posited that "as many as half of these juvenile super-predators could be young black males." *Id.*[21] Professor DiIulio also confined his super-predator to urban areas predominantly inhabited by people of color. He warned that "the trouble will be greatest in black inner-city neighborhoods" and that "the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even

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impending spike in juvenile crime rates. Another example was Dr. Frederick Goodwin, the Director of the Alcohol, Drug Abuse and Mental Health Administration, who in 1992:

> called for a "Violence Initiative" to study violence in the inner cities. In choosing to focus on children of the inner city, Dr. Goodwin suggested . . . that violence had a genetic component; [that] some individuals were more vulnerable to violent impulses; [that] these individuals could be identified at a young age; and [that] such vulnerability might be traced to inferior social structures, so that "maybe it isn't just careless use of the word when people call certain areas of certain cities jungles. He also referred to male monkeys who were both hyper-aggressive and hypersexual.

Rutherford, *supra*, at 723 (citations omitted).

[21] Professor DiIulio's predictions were steeped in racial overtones:

> My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [S]ome of these children kill, rape, maim, and steal without remorse.

DiIulio, *My Black Crime Problem*, *supra*, at 4.

the leaders of the Bloods and Crips . . . look tame by comparison." DiIulio, *Super-Predators*, *supra*, at 1, 3.

Similarly, in a 1996 report to then-U.S. Attorney General Janet Reno, Dean James Alan Fox of Northeastern University's College of Criminal Justice warned of a "future wave of youth violence" due to a population increase in the number of 14-17 year old African-American males that would begin in 2005 and "continue to expand well into the next century, easily surpassing the population levels of twenty years ago." James Alan Fox, U.S. Dep't of Justice, Bureau of Justice Statistics, *Trends In Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending* 3 (1996). According to Fox, this demographic change alone ensured an increase in the number of "teen killers." *Id.*

These reports were widely accepted as fact despite the lack of evidentiary support, a phenomenon detailed by U.S. Surgeon General in 2001, David Satcher, who at that time wrote that:

> [O]nly a few years ago, substantial numbers of leading experts involved in the study and treatment of youth violence had come to a strikingly different conclusion [about the effectiveness of programs to curtail youth violence]. Many were convinced then nothing could be done to stem a tide of serious youth violence that had erupted. . . ."

Office of the Surgeon Gen., *Youth Violence: A Report of the Surgeon General* Preface (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/toc.html. In fact, the super-predator myth gained

widespread acceptance throughout the 1990s, and the term was popularized by politicians, law enforcement officials, media outlets and the public. Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. Crim. L. & Criminology 729, 746-749 (2011); *see also supra* note 17; Gary Marx, *Young Killers Remain Well-Publicized Rarity: "Superpredators" Fail To Grow Into Forecast Proportions*, Chi. Trib., Feb. 11, 1998, at 1; Caldwell, *supra*, at 68.

As detailed by the submission of Academic Amici, the predictions of a new wave of super-predators never came to pass. Rather than increasing, the juvenile crime rate "dropped by more than half," thus discrediting the super-predator theory and causing Professor DiIulio to concede that "he wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19. Surgeon General Satcher's 2001 report rejected the super-predator myth, stating that:

> "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since decreased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness."

Office of the Surgeon Gen., *supra*, at Chapter 1,

Myths About Youth Violence; *see also id.* at Chapter 3, Superpredators? (describing inaccuracies which wholly undermined the super-predator myth). The Surgeon General's report also repudiated the racial mythology that youth of color, and African-American and Latino youth in particular, were more likely to become involved in youth violence. *Id.* at Chapter 1, Myths About Youth Violence, Chapter 2, Prevalence of Violent Behavior (noting that while racial differences in arrest rates exist, "[t]here are essentially no differences by race in the prevalence rates for serious self-reported violent behavior."); *see also id.* at Chapter 3, Cumulative Prevalence. Thus, the predictions regarding the rise of violent crime among youth, and in particular youth of color, were proven false by a sober reflection on the actual youth crime rate. [22]

3. The Legislators.

The legislative response to the myth of rampant violence by children of color changed the course of juvenile justice and provided a framework for the treatment of children that undermined the mitigating value of youth. Indeed, significant changes to state laws were made in response to the panic around juvenile crime. Laws were enacted to

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[22] *See also* Zimring, *Youth Violence Epidemic*, *supra*, at 728 (finding that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s" and that "there is no basis for making any projections fifteen years forward based on [then] current trends"); David Westphal, *Predicted Teenage Crime Wave Failed to Occur, Numbers Show*, Fresno Bee, Dec. 13, 1999, at A12 (detailing fact that predicted crime youth crime wave never happened); Editorial, *Children's Court: Back to the Future*, Chi. Trib., July 25, 1999, at 16 (same).

ease the prosecution of children in adult court and increase the range of harsh criminal sanctions faced by criminally involved youth, including life without parole sentences. "Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation." Beale, *Two Waves of Juvenile Justice*, *supra*, at 514. The racial appeals that led to exposure to harsh sentencing practices were rooted in the long-standing, widespread and faulty racial stereotypes that presume youth of color are prone to violence and criminality and pose a threat to public safety. Nunn, *supra*, at 709-710.

Politicians relied on the racially-charged, super-predator narrative and what proved to be inaccurate predictions about impending juvenile crime rates to "pursue genuine get-tough law-enforcement strategies against the super-predators." DiIulio, *Super-Predators*, *supra*, at 6.[23] Many adopted the racially-laden super-predator mantle popularized by Professor DiIulio. Indeed, the misguided language became so ubiquitous that then-presidential

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[23] For example, following the Central Park jogger incident, Manhattan Borough President and mayoral candidate David Dinkins advocated for an "antiwilding law" with enhanced penalties for anyone who committed a crime as part of a group, mayoral candidate Rudolph Giuliani called for harsh measures to "combat mindless violence perpetrated by marauding gangs on 'wilding' sprees," and Mayor Ed Koch pressed for the "death penalty in incidents of wilding." Welch, *supra*, at 10. Likewise, Professor DiIulio noted that "no one in academia is a bigger fan of incarceration than I am" and estimated that the United States would need to "incarcerate at least 150,000 juvenile criminals" in the years following his 1996 article. DiIulio, *Super-Predators*, *supra*, at 6.

candidate Senator Bob Dole proclaimed in a 1996 radio address that "[u]nless something is done soon, some of today's newborns will become tomorrow's super-predators — merciless criminals capable of committing the most vicious acts for the most trivial of reasons." *Dole Seeks to Get Tough on Young Criminals*, L.A. Times, July 7, 1996, at A16. In 1996, Senator John Ashcroft, who later became U.S. Attorney General, testified before a Senate Subcommittee on Youth Violence, that "[i]n America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities." S. 1425, *The Violent and Hard-Core Juvenile Offender Reform Act*, Opening Statement of Sen. John Ashcroft before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary (May 9, 1996).[24] Others spoke to the sentiments that animated the super predator narrative. As U.S. Senator from Illinois, Carol Moseley-Braun supported punitive measures for youth, noting that such tactics were

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[24] Florida Representative William McCollum, who wrote and unsuccessfully supported the Violent Youth Predator Act of 1996, also used racially charged language to drive harsh punishments for youth. The proposed Act, in part, mandated adult federal prosecution of 13 and 14 year olds for violent crimes or major drug trafficking offenses. Representative McCollum relied exclusively on the myth of the super-predator in proposing the legislation. The Executive Summary warned of the "[c]oming [s]torm of [v]iolent [j]uvenile [c]rime" and declared that "[n]o population poses a larger threat to public safety than young adult criminals." H.R. 3565, *The Violent Youth Predator Act of 1996*, Statement of Rep. William McCollum before the Subcomm. on Crime of the H. Comm. on the Judiciary (June 27, 1996).

necessary because of "a new category of offender" she described as children "who[ ] have no respect for human life [and] are arming themselves with guns and roaming the streets."[25] President Bill Clinton called juvenile crime the "ultimate threat to our country,"[26] and described it as a top law enforcement priority, warning in 1997 that "we've got about six years to turn this juvenile-crime thing around or our country is going to be living in chaos."[27]

The state legislative response was unprecedented. In nearly one-third of the states, laws were enacted to redefine the purpose of their juvenile courts to "emphasize public safety, certain sanctions, and/or the accountability of offenders." Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Between 1992 and 1997, nearly every state changed its laws to ease the transfer of youth into adult court and subject children to exceedingly harsh penalties, including life without parole. John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 Fed. Sent'g. Rep. 87 (2010). Forty-seven states and the District of Columbia made substantive changes to state laws concerning juvenile justice,

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[25] Sen. Carol Moseley-Braun, *Should 13-Year-olds Who Commit Crimes with Firearms Be Tried as Adults? Yes: Send a Message to Young Criminals*, 80 A.B.A. J. 46 (Mar. 1994).

[26] Earle Ofari Hutchinson, *Teen Crisis Not All Bad News*, Chi. Trib., Aug. 14, 1997, at 23 (internal quotation marks omitted).

[27] Jonathan Peterson, *Gangs, Youth Crimes Target of Major Effort: Clinton Says Juveniles Top Enforcement Priority*, Contra Costa Times, Feb. 20, 1997, at B1 (internal quotation marks omitted).

including changes that broadened juvenile jurisdiction and increased sentences. Torbet, *supra*, at 59. Prosecutors were granted unfettered discretion to try youth in adult courts and subject the accused to adult sanctions like life without parole. Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Critically, as detailed by the Academics Amici, these measures were not responsible for the decline in juvenile crime or homicide rates.[28]

The federal legislative response to the rise of the so-called teen super-predator provides significant insight into how the racialized criminalization of youth infected the legislative process. An analysis of 16 congressional hearings on youth violence, held between 1995 and 2001, reveals a clear distinction between discourse around racially-tainted gang violence[29] and the rash of school shootings that took place in predominantly white, suburban schools.

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[28] *See also supra* note 9; Elizabeth Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 La. L. Rev. 35, 37, 56 (2010) (noting "that studies that have examined the impact of the adoption of punitive policies on youth crime rates yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws" and that "[t]he evidence that the reforms have contributed to the decline in crime rates is weak.").

[29] Historically, criminally involved youth of color have been characterized as gang members, thereby attaching a silent racial meaning to the term. Rutherford, *supra*, at 720-21; *see also* Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 Loy. L.A. L. Rev. 747, 763 (2001) (discussing the close association between gang membership and minority youth used by politicians and commentators to deal in implicit racial terms.).

Elizabeth Brown, *Crime, Governance, and Knowledge Production: The "Two Track Common-Sense Approach" to Juvenile Criminality in the United States*, 36 Soc. Just. 102 (2009), *available at* 2009 WLNR 25016000 (Jan. 1, 2009). Gang violence prompted "'get-tough' legislation, punitive political rhetoric, and racialized media imagery that promote[d] fear of the urban [African-American and Latino] male." *Id.* Gang members "evidenced the emergence of a new class of violent children" created by the bad moral choices of single-parent families. *Id.* In response, legislators advocated for the use of juvenile justice and adult criminal sanctions as a means of social control to curb criminality. In contrast, in many cases, school violence demanded "the attention and therapeutic, disciplinary, and benevolent resources of state power" to intervene in the lives of children and prevent such incidents from happening again. *Id.*

Thus, the connections between race, crime and youth led to punitive sanctions, like life without parole, for young offenders. Sinister beliefs about race, crime and age erased the longstanding distinction between youth and adults, rendering the sentencing practice currently before this Court unconstitutional.

III. Consistent with Their History, Juvenile Life Without Parole Laws Are Overwhelmingly Imposed Upon Children of Color.

The pernicious influence of racial stereotypes about youth of color, and the punitive crime legislation borne from those stereotypes, is evident

from the stark racial disparities in the practice of juvenile life without parole sentencing. Based on available data, it appears that African-American youth nationwide serve life without parole sentences "at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth)." Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 39 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf [hereinafter AI/HRW, *Rest of Their Lives*]; *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F.L. Rev. 983, 993 (2008). Though African Americans comprise only 16% of the national youth population,[30] the available data reveals that African Americans make up 60% of all youth serving life without parole sentences, AI/HRW, *Rest of Their Lives*, *supra*, at 39. According to this same data, "the rate for black youth sentenced to life without parole" exceeds that of white youth in every state with juvenile life without parole. *Id.* at 42.

Racial disparities in juvenile life without parole sentences are not surprising given that these disparities exist at all levels of children's contact with the criminal justice system. *See* Feld, *Unmitigated Punishment*, *supra*, at 35-38. "When racial/ethnic disparities do occur, they can be found

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[30] Charles Puzzanchera & Benjamin Adams, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Arrests 2009*, Juvenile Offenders and Victims: National Report Series. Dec. 2011, at 6, *available at* www.ojjdp.gov/pubs/236477.pdf.

at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youth are processed through the justice system." Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report* 188 (Mar. 2006), *available at* http://www.ojjdp.gov/publications/pubabstract.asp?pubi=234394. Thus, although African Americans comprise only 16% of the youth population, they make up:

- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of the detained population;
- 34% of youth formally processed by the juvenile court;
- 30% of adjudicated youth;
- 35% of youth judicially waived to criminal court;
- 38% of youth in residential placement; [and]
- 58% of youth admitted to state adult prison.

Nat'l Council on Crime & Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 37 (Jan. 2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf; *see also* Snyder & Sickmund, *supra*, at 176 (providing data on black youth's

"disproportionate share of cases at all stages of case processing" in 2002).

Indeed, "[t]hroughout the [criminal justice] system, youth of color – especially African American youth – receive different and harsher treatment. This is true even when White youth and youth of color are charged with similar offenses." Nat'l Council on Crime & Delinquency, *supra*, at 37; *see also* Feld, *Unmitigated Punishment*, *supra*, at 36 ("After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths."); AI/HRW, *Rest of Their Lives*, *supra*, at 39 (noting research finding that "minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing").[31] In a study of youth arrested for murder in 25 states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youth. Human Rights Watch, *The Rest of Their*

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[31] A study of 77,236 individuals sentenced under the federal sentencing guidelines demonstrates the severe racial disparities in sentencing people of color. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285 (2001). On average, African Americans in this study received sentences that were 99.6% longer than sentences for whites. *Id.* at 296. Latinos' sentences were 68.5% longer. *Id.* Even when controlling for offense level, criminal history, district of conviction, and offense type, African Americans, Latinos, and other minorities had federal criminal sentences that were, respectively, 5.5, 4.5, and 2.3 months longer than their white counterparts. *Id.* at 300.

Lives: Life without Parole for Youth Offenders in the United States in 2008 6-7 (May 2008), *available at* http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf.

The racial disparities with respect to juvenile life without parole for homicide offenses are especially troubling given the steady decline of murders committed by children in the past two decades. Since 1993, the juvenile arrest rate for murder "fell substantially through 2000, resting at a level that essentially remained constant for the entire decade. Compared with the prior 20 years, the juvenile murder arrest rate between 2000 and 2009 has been historically low and relatively stable." Puzzanchera & Adams, *supra*, at 9. This decline was mirrored by the juvenile murder arrest rate of African-American youth, which "fell . . . considerably more" than the rate of white youth from 1994 through 2000, though it increased 10% in the past decade. *Id.*

IV. Proper Evaluation of Culpability Has Been Undermined by the Racially Charged Criminalization of Youth of Color.

A proper evaluation of culpability is a fundamental component of a constitutional sentence under the Eighth and Fourteenth Amendments. History reveals that racial stereotypes helped to propel the implementation of the laws allowing for juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. Because it is clear that race critically and inappropriately informs the assessment of blameworthiness in the context of juvenile life

without parole sentencing, such sentences are unconstitutional.

As detailed above, the racialized criminalization of youth fostered exposure to more punitive sanctions, like life without parole, for children. These harsh punishments had previously been reserved for adult offenders in the criminal justice system. "As the blurring of the line between juvenile and criminal court increases, so does the likelihood that these trends" – like life without parole – "will disproportionately affect youth of color." Nat'l Council on Crime & Delinquency, *supra*, at 37. Adult criminal sanctions for juveniles, and the faulty link between race and crime that drives them, diminished the mitigating value of youth and, therefore, undermined an accurate consideration of culpability required in sentencing.

Youthfulness unquestionably has a bearing on culpability; this Court's precedents recognize the differences between youth and adults and the diminished culpability of juvenile offenders.[32] But the racial stereotypes animating the laws that allow

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[32] *See Graham*, 130 S. Ct. at 2026-27; *Roper*, 543 U.S. at 569-70; *see also J.D.B.*, 131 S. Ct. at 2403-04 (detailing this Court's precedents describing differences between youth and adults); *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (O'Connor, J., concurring) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. . . . The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.") (citations and internal quotation marks omitted); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (discussion of children less responsible than adults).

life without parole sentences for children – and the racially disproportionate implementation of these extreme sentences – demonstrate that children of color are less likely to receive the "benefit" of youth in the context of sentencing for serious crimes. The race-based, super-predator narrative itself is "the antithesis of childhood;" thus, the policies it wrought treat youth accordingly. Nunn, *supra*, at 713.

Social science studies confirm the pernicious impact of racial stereotypes that characterize the juvenile, super-predator narrative. In one study, researchers activated negative stereotypes about juvenile offenders of color in the minds of 200 police and probation officers. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. Hum. Behav. 483, 488-95 (2004). Ultimately, the researchers found that "unconscious biases trigger the belief that [African-American adolescent offenders] are adult-like and therefore as blameworthy as adults who commit similar crimes." *Id.* at 500. Police officers were "less likely to judge the offender as immature (by virtue of adolescence) and more likely to perceive him as culpable and deserving of punishment." *Id.* at 494. Moreover, the research demonstrated that "the more culpable an offender was perceived to be, the greater the endorsed punishment." *Id.* at 498.[33]

Another study, which examined probation

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[33] The "automatic stereotype activation does not require perceivers to endorse the stereotype, to dislike African Americans, or to hold any explicit prejudice toward that group. Even decision makers with good intentions are susceptible." *Id.* at 499.

officers' narrative reports concerning sentencing recommendations for youth offenders, also confirmed that race undermined culpability determinations. *See* Bridges & Steen, *supra*, at 557-58. The researchers analyzed what the probation officers deemed the cause of the youth's criminal behavior and found that "officers describe[d] black and white youths differently, referring to negative personality traits for black youths and more negative environmental influences for whites." *Id.* at 561. "[B]lack youths were judged [by probation officers] to have a higher risk of reoffending than . . . white youths." *Id.* Moreover, researchers found that "[b]eing black significantly reduces the likelihood of negative *external* attributions," such as peer groups, family dysfunction and drug abuse, "and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior." *Id.* at 563-64 (emphasis in original). The perceived negative personality traits of African-American and other youth of color led officials to assess them as more culpable and dangerous than white youth and, therefore, to recommend more severe sentences for youth of color. *Id.* at 567.

In light of the preceding arguments, the possibility that race may play any role in the administration of justice is especially disturbing in the context of life without parole sentences for youth. This Court has recognized the unique severity of such sentences, which "alter[ ] the offender's life by a forfeiture that is irrevocable." *Graham*, 130 S. Ct. at 2027. At bottom, the gross racial disparities that

pervade life without parole sentencing for children demonstrate that negative perceptions of youth of color have stymied the proper evaluation of their culpability. As detailed in Section I, race cannot play any role in the imposition of criminal sanctions. The influence of race on the sentencing of youth to life without parole, therefore, invalidates and renders unconstitutional the practice of sentencing children to die in prison.

CONCLUSION

The current sentencing structure that imposes life without parole sentences on youth offenders was borne out of racially charged stereotypes about children of color. While these stereotypes have been proven false, they have nevertheless undermined the constitutionally mandated evaluation of a youth's culpability. This is demonstrated by stark racial disparities for children caught within the criminal justice system and subsequently sentenced to life without parole. Under such circumstances, the substantial risk of imposing excessive sentences on children calls into question the constitutionality of the most extreme sentence currently available to them. For these reasons, in addition to those raised by Petitioners and their supporting amici, this Court should categorically bar all children under the age of 18 from receiving life without parole sentences.

Respectfully submitted,

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ADDENDUM

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights to equal protection under the law. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as amicus curiae in this Court in, *inter alia*, *Graham v. Florida*, 560 U.S. __, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986); *McClesky v. Kemp*, 481 U.S. 279 (1987); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Swain v. Alabama*, 380 U.S. 202 (1965).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.

LatinoJustice PRLDEF was founded in 1972 as the Puerto Rican Legal Defense and Education Fund and is one of the nation's leading civil rights public interest law offices that represents Latinas and Latinos throughout the Eastern seaboard and works

to increase their entry into the legal profession. LatinoJustice PRLDEF has a strong interest in addressing civil rights and human rights violations within the Latino communities of the United States and uses the courts to rectify these abuses. Accordingly, it has an interest in the juvenile justice matters presented in this litigation and their effects on Latino youth.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The racially discriminatory and barbaric treatment of juveniles by the criminal justice system threatens the rights of Asian Americans and all Americans.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals, and towards this end, opposes the sentencing of juveniles to life without parole, a practice in violation of the Eighth Amendment's bar against cruel and unusual punishment. Fairness and equality in the administration of justice is a fundamental civil and

human right, but the extreme racial disparities that exist within the criminal justice system denies this right to the most vulnerable segments of society, including minorities and youth. In order to advance its mission, The Leadership Conference is dedicated to eliminating all forms of discrimination from our criminal justice system, and as such, has a vital interest in the outcome of this case.

AMICUS CURIAE BRIEF

Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas

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BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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Pursuant to this Court's Rule 37.2, *amicus curiae* National District Attorneys Association (NDAA) respectfully files this brief in support of respondents.*

INTEREST OF *AMICUS CURIAE*

Amicus NDAA is the oldest and largest organization representing the Nation's prosecutors. Its aim is to assist prosecutors in their mission of safeguarding the public and ensuring that justice is done. Its approximately 7,000 members are responsible for enforcing the criminal laws of every State and territory. Because this responsibility includes the prosecution of juveniles who commit homicide, NDAA's members are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide. In light of this real-world experience, *amicus* urges this Court not to adopt a categorical rule of federal constitutional law that a 14-year-old convicted of homicide may *never*, under *any* circumstances, be sentenced to life without parole.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a constant tension in the law between a desire for bright-line legal rules, on the one hand, and a desire for flexible fact-specific standards, on the other. Perhaps nowhere is this tension more evident

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* The parties have globally consented to the filing of *amicus* briefs in these cases and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* NDAA hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

than in the area of criminal sentencing, as underscored by the tortured history of the Federal Sentencing Guidelines. *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Mistretta v. United States*, 488 U.S. 361 (1989). Over the years, the idea that criminal sentences may appropriately be imposed and assessed by reference to categorical bright-line rules, as opposed to holistic consideration of individual cases, has passed in and out of vogue. *See, e.g., Mistretta*, 488 U.S. at 363-67.

That ongoing tension is reflected in the present cases. This Court's precedents make it clear that, under the Eighth Amendment, an individual 14-year-old cannot be sentenced to life in prison without the possibility of parole, even for homicide, if that sentence is grossly disproportionate to the offense in light of all the facts and circumstances. *See generally Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also Graham v. Florida*, 130 S. Ct. 2011, 2040 (2010) (Roberts, C.J., concurring in the judgment); *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The question presented here is whether this Court should jettison that holistic approach in favor of the bright-line rule that a 14-year-old may *never*, under *any* circumstances, be sentenced to life without parole. *Amicus* respectfully submits that the Eighth Amendment provides no warrant for any such categorical rule.

Our Constitution has endured for more than two centuries precisely because it does not purport to regulate all the many and varied details of our national life. Societal views on such matters as appropriate criminal punishments change over time, and do not ineluctably evolve in a single direction. It

is ironic that petitioners, who decry determinate bright-line rules established by legislatures to *impose* criminal sentences, are asking this Court to establish a determinate bright-line rule to *review* criminal sentences. Never in our Nation's history has this Court interpreted the Eighth Amendment as a national penal code that categorically addresses the length of prison sentences that may be meted out to those convicted of homicide. This Court should not stray from that path now.

It would be particularly inappropriate for this Court to adopt the proposed categorical rule that a 14-year-old convicted of homicide may *never* be sentenced to life without parole because there is absolutely no societal consensus against such punishment. To the contrary, petitioners themselves concede that a lopsided majority of States authorizes life without parole for 14-year-olds convicted of certain homicides. Indeed, this Court recently held that the Eighth Amendment does not allow the death penalty for juveniles convicted of homicide in part *because of* the availability of life without parole as an alternative punishment. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."). The relative rarity of such sentences speaks to the fact that, at least in today's world, few 14-year-olds are charged with, or convicted of, homicide. But that fact provides neither reason nor license for this Court to invent a new rule of constitutional law. Under current law, as noted above, the Eighth Amendment provides an avenue for

relief if a sentence of life without parole is grossly disproportionate to the offense in a particular case. But nothing in the Eighth Amendment categorically condemns such punishment. Accordingly, this Court should affirm the judgments.

ARGUMENT

The Eighth Amendment Does Not Establish The Categorical Rule That A 14-Year-Old Convicted Of Homicide May *Never*, Under *Any* Circumstances, Be Sentenced To Life Without Parole.

The Eighth Amendment has long been construed to impose a check on freakish criminal sentences that, under all of the facts and circumstances of a particular case, are grossly disproportionate to the offense. *See, e.g.*, *Solem*, 463 U.S. at 290; *Weems v. United States*, 217 U.S. 349, 373-78 (1910); *see also Graham*, 130 S. Ct. at 2040 (Roberts, C.J., concurring in the judgment); *Harmelin*, 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, the question presented here is not whether the Eighth Amendment categorically *allows* a 14-year-old convicted of homicide to be sentenced to life without parole, but instead whether the Eighth Amendment categorically *prohibits* such a sentence. The answer to that question is no.

A. There Is No Societal Consensus Against The Sentence Of Life Without Parole For 14-Year-Olds Convicted Of Homicide.

Although the Eighth Amendment prohibition on the infliction of "cruel and unusual punishments" is hardly self-defining, it does not give judges license to

invalidate whatever punishments they, as legislators, might not have favored. To the contrary, "we may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Thus, "those who would attack the judgment of the representatives of the people" bear the "heavy burden" of proving that a particular punishment duly authorized by law is utterly outside the mainstream of our societal norms. *Id.*

Petitioners cannot carry that burden here. As this Court has explained, the "most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). By petitioners' own count, no fewer than ***39 States*** authorize a sentence of life in prison without the possibility of parole for those convicted of certain homicides committed at age 14 or older. *See* Br. for Pet'r Kuntrell Jackson, No. 10-9647 (Pet'r Br.) Apps. A & B (listing state statutes). Under these circumstances, petitioners cannot possibly establish the existence of a societal consensus against such punishment.

Undaunted, petitioners discount the import of those statutes on two grounds. ***First***, they argue that statutes authorizing a particular punishment for 14-year-olds do not reflect a considered legislative judgment that such punishment is appropriate for 14-year-olds. *See* Pet'r Br. 43-45. ***Second***, they argue that, in practice, few 14-year-olds are sentenced to life without parole. *See id.* at 47-52. Both arguments are unavailing.

1. Statutes That Authorize Particular Punishments Reflect Legislative Judgments That Those Punishments Are Appropriate.

Petitioners first contend that this Court should ignore the widespread and recent legislation that "responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime" by "lowering the age at which children could be prosecuted in adult court." Pet'r Br. 43. Petitioners deride such legislation as "politically popular," *id.*, as if that were a negative and did not reflect the very societal consensus that petitioners now seek to deny. According to petitioners, these statutes are entitled to no weight in the Eighth Amendment analysis because "there is no evidence of any significant legislative consideration of the specific question whether lifelong imprisonment without parole is appropriate for young adolescents." *Id.* at 44.

Petitioners' argument is profoundly disrespectful of our federal system and of democracy itself. At issue here are not some archaic or outlier laws, but statutes passed very recently by a *majority* of States in response to a specific societal concern—a significant spike in violent crime by juveniles in the late 1980s and early 90s. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice Reform Initiatives in the States 1994-1996*, at 42 (1997). As a result of that spike, many reasonable people across the country concluded that the existing juvenile justice system was too lenient. *See, e.g.*, Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice*

System", 22 Pepp. L. Rev. 907, 907-08 (1995). The legislative response was a "dramatic expansion" of the circumstances under which juveniles charged with violent crimes could be prosecuted as adults. *Juvenile Justice Reform Initiatives, supra*, at 42; *see also* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* at iii, xv (1996); General Accounting Office, *Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* 5 (1995).

Petitioners caricature these laws as purely technical in nature, as if they "simply regulate[d] the boundary between juvenile-court and adult-court jurisdiction." Pet'r Br. 45. But the obvious reason that States began trying juveniles in the same courts as adults was to subject juveniles to the same punishment as adults. It is fanciful to suggest that States had no clue that they would be subjecting violent juvenile offenders to adult punishment (including life without parole) by trying them as adults. Indeed, the very mantra of the juvenile-justice reform movement of the 1990s was "Adult Time for Adult Crimes." *See, e.g.*, Robert Zausner, *After Ridge Gets The Spotlight, Pa. Rape Victim Grips the Audience*, Phila. Inquirer, Aug. 14, 1996, at A13 ("[Governor] Ridge reiterated a point he had made in his speech: 'Do an adult crime, you will do adult time."); Scott M. Fincher, *Juvenile Crime Law Signed*, Chicago Tribune, June 12, 1996, at 3 ("Legislation requiring 'adult time' for 'adult crime' by juvenile offenders was signed into law Tuesday.").

The resulting state "transfer statutes" (*i.e.*, statutes that either authorize or require the transfer of juveniles to the adult-court system) do not

indiscriminately authorize or require all juveniles to be tried as adults. Rather, they draw careful legislative lines. Some transfer statutes authorize or require the transfer of juveniles charged with specific violent crimes, including homicide. *See, e.g.*, Conn. Gen. Stat. § 46(b)-127 (requiring transfer of "any child charged with the commission of a capital felony").[1] Other transfer statutes achieve the same result by authorizing or requiring the exclusion of certain violent crimes, including homicide, from juvenile-court jurisdiction. *See, e.g.*, Md. Cts. & Jud. Proc. Code § 3-8A-06 (excluding crimes that, "if committed by an adult, would be punishable by death or life imprisonment").[2] It defies reason to suggest that the legislatures that enacted these statutes failed to perceive that they were thereby subjecting violent juvenile offenders to adult punishment, including life without parole.

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[1] *See also* Ala. Code § 12-15-203 (authorizing transfer for murder and listing factors for court to consider); Ga. Code § 15-11-28(b)(2)(A)(i) (requiring transfer of minors age 13 to 17 charged with murder); Ohio Rev. Code § 2152.12 (authorizing transfer of juveniles charged with "aggravated murder, murder, attempted aggravated murder, or attempted murder"); S.C. Code § 63-19-1210(6) (authorizing transfer of juveniles charged with murder); Va. Code § 16-1-269.1(B), (C) (requiring hearing on transfer when juvenile is charged with murder); W. Va. Code § 49-5-10(d)(1) (requiring transfer if the court finds probable cause that juvenile committed murder).

[2] *See also* Idaho Code § 20-509(1)(a) (excluding "murder of any degree or attempted murder"); Mass. Gen. Laws ch. 119 § 74 (excluding "murder in the first or second degree"); N.J. Stat. § 2A:4A-26(a)(2)(a) (excluding "[c]riminal homicide other than death by auto"); N.D. Cent. Code § 27-20-34(1)(b) (excluding murder and attempted murder); Okla. Stat. tit. 10A, § 2-5-101(B) (excluding any person aged 13 through 17 "who is charged with murder").

In any event, contrary to petitioners' assertion, *see* Pet'r Br. 44, there is ample evidence that States were well aware that authorizing or requiring certain violent juvenile offenders to be tried as adults could lead to a sentence of life without parole. "[A]lthough state legislatures typically do not create legislative materials like those produced by Congress," *Kennedy v. Louisiana*, 554 U.S. 407, 452-53 (2008) (Alito, J., dissenting), there can be no doubt that the public (not to mention the legislators themselves) understood that this was both the intent and the effect of the expanded transfer statutes. *See, e.g.*, Linda Satter, *The Kids and the Courts: Lawmakers Face Tough Balance of Crime, Punishment*, Arkansas Democrat-Gazette, June 29, 1998, at A1 ("Under this proposal, a person 13 or younger could serve life in prison without parole if convicted of capital murder in adult court."); Jolayne Houtz, *Hardened Kids Doing Harder Time for Crimes*, Seattle Times, Mar. 2, 1994, at A1 (describing Washington legislative proposals that would "transfer anyone 14 or older who commits a violent offense while armed with a firearm into adult court" and noting that juvenile defendants tried as adults could be sentenced to life without parole); Jay Euban, *Hunt Urges House To Pass Crime Bills*, News & Record (Greensboro, N.C.), Mar. 9, 1994, at B1 (listing various crime bills enacted or under consideration by the North Carolina legislature, including legislation to "[t]ry violent juveniles as adults" and impose "[l]ife without parole for 1st Degree Murder").

Indeed, in the years before *Roper*, legislative debates about the death penalty for juveniles often focused on the availability of life without parole as an alternative sentence. *See, e.g.*, Anjeanette Damon,

Senate Vote Abolishes Juvenile Death Penalty, Reno Gazette-Journal, Apr. 29, 2005, at A1 (describing proposed Nevada legislation to replace juvenile death penalty with life without parole); Associated Press, *Juvenile Death Penalty Bill Heads to Legislature*, Jan. 5, 2004 (quoting Wyoming legislator sponsoring bill to replace juvenile death penalty with life without parole: "We're not taking away prisons or life without parole."). Petitioners themselves, as they must, concede this linkage. *See* Pet'r Br. 46 n.54 (citing statutes that replaced the juvenile death penalty with life without parole).

The absence of a societal consensus against the punishment of life without parole for juveniles convicted of homicide is equally illustrated by unsuccessful efforts to repeal that penalty. Thus, in recent years, the Florida, Nebraska, and Louisiana legislatures have expressly considered, and rejected, bills to allow parole for juveniles sentenced to life for homicide. *See, e.g.*, Gary Blankenship, *Criminal Law Section Supports Review of Death Penalty Process*, Florida Bar News, Oct. 15, 2011, at 1 ("Lawmakers earlier this year considered a bill that would provide parole review for life-sentenced juveniles, but it failed."); Kevin O'Hanlon, *Juvenile Killers Won't Get Parole*, Lincoln Journal Star, Apr. 8, 2011 (reporting on failure of bill that would have allowed parole for juveniles convicted of homicide despite sponsor's argument that "the rationale" behind *Graham* and *Roper* requires the possibility of parole in such cases); *Supreme Court Decision Could Affect Louisiana Inmates*, The News-Star (Monroe, La.), May 18, 2010 ("Coinciding with the court's decision [in *Graham*], is a bill making its way through the state Legislature to revisit life without parole for any juvenile, including

those found guilty of a homicide."); SB494-2010 Regular Session, *available at http://legis.la.gov/billdata/History.asp?sessionid=10RS&billid=SB494* (last visited Feb. 21, 2012) (reporting failure of Louisiana bill). Needless to say, if there truly were a societal consensus against life without parole for juveniles convicted of homicide, the failure of these bills would be inexplicable, as would the United States' staunch opposition to "a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles." Pet'r Br. 51. Let there be no mistake about what is really going on here: petitioners are trying to achieve by federal judicial fiat what they have failed to achieve through the democratic process.

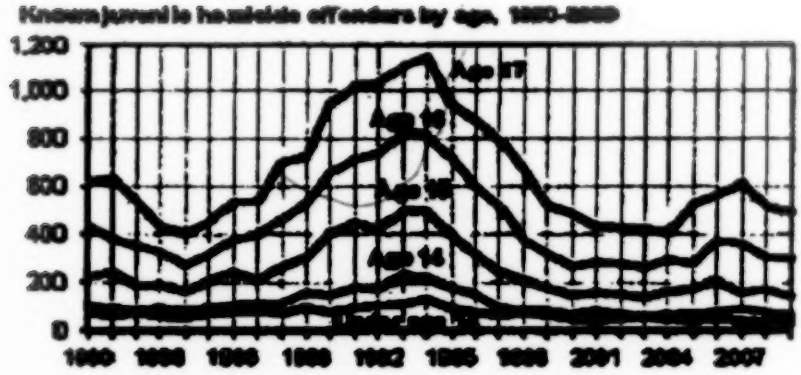
2. The Frequency With Which Particular Punishments Are Imposed Does Not Necessarily Reflect Societal Judgments About Those Punishments.

Petitioners next assert that this Court should ignore the widespread and recent legislation authorizing life without parole for 14-year-olds convicted of homicide on the ground that, "in actual practice," the imposition of such punishment "is an aberrant, exceedingly rare occurrence." Pet'r Br. 47 (capitalization modified). Petitioners base that assertion on the proposition that, by their own unofficial count, "[t]here are only about 79 persons in the United States under life-without-parole sentences for offenses committed at age 13 or 14." *Id.* According to petitioners, this alleged number—in and of itself—"evidences nationwide repudiation, not

acceptance, of the sentence for children of these young ages." *Id.*

That argument is a *non sequitur*. As this Court explained in *Graham*, discussion of the absolute number of persons subjected to a particular sentence is meaningless without consideration of the "base number of certain types of offenses." 130 S. Ct. at 2025. There are many grave offenses for which few—if any—persons have ever been convicted or punished. *See, e.g.*, 18 U.S.C. § 1751 (assassination of the President or Vice-President); 18 U.S.C. § 351(a) (assassination of a member of Congress or Justice of the Supreme Court); 18 U.S.C. § 32 (destruction of an aircraft); 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 2381 (treason); 18 U.S.C. § 175 (possession or development of biological weapons); 18 U.S.C. § 229 (possession or development of chemical weapons). That does not establish a societal consensus against punishing persons who have committed, and been convicted of, such offenses; rather, it simply shows that few, if any, persons have committed, and been convicted of, such offenses in the first place.

Thus, the number of 14-year-olds who have been sentenced to life without parole for homicide reflects nothing so much as the fact that, thankfully, relatively few 14-year-olds commit homicide. According to Justice Department statistics, over the past thirty years, on average just 176 persons age 14 and younger per year have been reported as homicide offenders in our country of more than 300 million people. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Statistical Briefing Book* (Dec. 9, 2011), *available at* http://www.ojjdp.gov/ojstatbb/offenders/qa03104.asp?qaDate=2009 (last visited Feb. 21, 2012).



And, as might be expected, the numbers vary widely by region.[7] Thus, in each of five States (Maine, New Hampshire, North Dakota, Vermont, and Wyoming) only 15 or fewer persons age 17 and younger are reported to have committed homicides over the *entire* 15-year period from 1994 to 2009 (these statistics do not break down the data for persons 14 and younger). *See* C. Puzzanchera & W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2009* (2011), *available at* http://ojjdp.gov/ojstatbb/ezashr/ (last visited Feb. 21, 2012).

Indeed, far from showing that the current system is broken, the fact that relatively few 14-year-olds have been sentenced to life without parole only confirms that the system is working perfectly well. Prosecutors do not charge every juvenile potentially eligible for life without parole with a crime that might trigger that sentence. To the contrary, prosecutors exercise discretion in their charging decisions, taking into account such factors as the defendant's age and relative culpability. To assist prosecutors in the exercise of this responsibility, *amicus* NDAA has published guidelines addressing a variety of factors to be considered, including "[t]he juvenile's age, maturity, and mental status" as well as the seriousness of the offense, the juvenile's role in

the offense, prior criminal history, and threat to the community. National District Attorneys Association, *National Prosecution Standards* 64-68 (3d ed. 2009); *see also* National District Attorneys Association, *Resource Manual & Policy Positions on Juvenile Crime Issues* (2002) ("The primary factors" influencing charging decisions are "the seriousness of the crime, the threat to public safety, the offender's criminal history, the certainty of appropriate punishment, *and the age and maturity of the offender*.") (emphasis added).

Along with the relatively small number of 14-year-olds who commit homicide in the first place, the fact that professional prosecutors exercise restraint in their charging decisions helps explain the relatively small number of persons currently serving life without parole for homicides committed at age 14. Based on their real-world experience, prosecutors are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide, and typically charge only the most egregious juvenile offenders with crimes that could lead to such a severe sentence. Two recent examples illustrate the point.

Donald Torres.[3] One night, while his neighbors were asleep, 14-year-old Donald Torres entered their home, doused it with kerosene, and ignited it. All four members of the family, including two children aged four and one, perished in the ensuing fire. Torres planned the attack earlier in the day, when he spotted a can of kerosene on the victims' porch and selected it as the murder weapon. Torres ensured

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[3] Telephone interview with Paul R. Wallace, Chief of Appeals, Delaware Department of Justice (Jan. 30, 2012); *see also Torres v. Delaware*, 608 A.2d 731 (Del. 1992) (unpublished).

that the family's only exit, a stairwell, was primed to explode in flame to prevent the victims from escaping. From outside the home, Torres watched as the flames spread and the father ran outside and then back inside in an unsuccessful attempt to save his family. Torres' actions were neither impulsive nor driven by peer pressure.

Delaware prosecutors considered various charges against Torres. They knew that a conviction of first-degree murder would result in a mandatory sentence of life without parole (because Delaware has no parole). They considered Torres' age and the mandatory nature of the penalty among the many factors that informed their charging decision. They ultimately decided to charge him with first degree murder, concluding that his age did not reflect the gravity of his crime, including his careful planning, the fact that he acted alone and without provocation, and that he bragged to friends about the crime. Prosecutors also relied on a psychological evaluation finding that Torres lived in a stable home, suffered from no mental disorders, and had no history of physical or sexual abuse.

A jury convicted Torres of four counts of intentional murder and four counts of felony murder. Under Delaware law, he was sentenced to eight consecutive life sentences.

Ashley Jones.[4] Sisters Ashley Jones, age 14, and Mary Jones, age 10, lived with their grandparents,

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[4] Telephone interview with Laura Poston, Assistant District Attorney, Jefferson County, Ala. (Jan. 31, 2012); telephone interview with Michael Anderton, Assistant District Attorney, Jefferson County, Ala. (Feb. 8, 2012); *see also Alabama v. Jones*, No. CC-2000-0151 (Cir. Ct. of Jefferson Cty., Ala., May 25, 2001) (unpublished).

Deroy and Mary Elizabeth Nalls. After the grandparents prohibited Ashley from seeing her boyfriend, she hatched a plan to murder them. While the family was asleep, Ashley and her boyfriend—at Ashley's direction—shot, stabbed, and burned the grandparents, an aunt who was staying in the home, and Ashley's sister Mary, whom Ashley herself insisted on stabbing. Ashley's grandmother and sister survived; her grandfather and aunt did not. When police later revealed that Mary had survived, Ashley responded, "I thought I killed that bitch."

Alabama prosecutors considered various charges they might bring against Ashley. Under Alabama law, various statutory guidelines, including "[t]he extent and nature of the physical and mental maturity of the child," Ala. Code § 12-15-203(d)(5), guide the decision to try a juvenile as an adult. Prosecutors decided to prosecute Ashley for capital murder and attempted murder after concluding that her age did not reflect the gravity of her crime, including her careful advance planning, control over an accomplice, and emotionless response. In making the charging decision, prosecutors also considered the fact that Ashley was not escaping an abusive home, and a psychological evaluation showing that she suffered from no formal disorders. A judge agreed with prosecutors that Ashley belonged in adult court facing an adult sentence.

A jury convicted Ashley of two counts of capital murder and two counts of attempted murder. She is currently serving life without parole.

These cases underscore that the categorical approach proposed by petitioners is unsound and

unwarranted.[5] Under current law, any particular 14-year-old may challenge a sentence of life without parole as grossly disproportionate under the Eighth Amendment. The categorical approach advocated by petitioners thus does nothing more than provide a windfall to the most egregious juvenile offenders, like Donald Torres and Ashley Jones, who could not possibly establish that their sentences are grossly disproportionate to their crimes under all the facts and circumstances.

B. The Categorical Rule Proposed By Petitioners Would Transform The Eighth Amendment Into A National Code Of Juvenile Justice.

Under our federal system, "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). To accept petitioners' arguments in this case would be to transform the Eighth Amendment into nothing less than a National Code of Juvenile Justice.

The logic of petitioners' arguments sweeps far beyond the validity of sentences of life without parole for 14-year-olds convicted of homicide. Indeed, that logic calls into question *every* criminal sentence meted out to a juvenile. For one thing, there is little functional difference between a lengthy term of years

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[5] For other accounts of juveniles sentenced to life without parole for their crimes, *see* Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* (2009) *available at* http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens (last visited Feb. 21, 2012).

and life in prison. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 79 (2003) (Souter, J., dissenting) ("[B]ecause [the defendant] was 37 years old when sentenced, the substantial 50-year period amounts to life without parole," and it would be "unrealistic" to "reject the practical equivalence of a life sentence without parole and one with parole eligibility at 87" because "an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all."). Nor are such functional-equivalence arguments necessarily limited to lengthy terms of years; rather, they may also apply to shorter terms of years imposed consecutively. *See, e.g.*, *Postelle v. Florida*, 383 So. 2d 1159, 1163 (Fla. Dist. Ct. App. 1980) (affirming consecutive terms amounting to 114 years in prison for juvenile convicted of homicide).

These are not idle hypotheticals. In the wake of *Graham*, the lower courts are already fielding such challenges. *See, e.g.*, *Angel v. Virginia*, 704 S.E.2d 386, 402 (Va. 2011) (addressing argument that non-homicide sentence violated *Graham* because the State does not allow parole until age 60 or 65); *Arizona v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (addressing argument that consecutive sentences totaling 139.75 years contravenes *Graham*); *Thomas v. Florida*, No. 1D10-1613, __ So. 3d __, 2011 WL 6847814 (Fla. Dist. Ct. App. Dec. 30, 2011) (addressing argument that 50-year sentence is the functional equivalent of life without parole).

Moreover, petitioners' position necessarily leads to the question of when, ostensibly as a matter of federal constitutional law, an opportunity for parole must be offered to a juvenile sentenced to life. That question is particularly vexing with respect to those

States, like Delaware, that do not have parole at all. Petitioners seem to hint at an answer to this question when they request that Jackson be given access to the Arkansas parole system on the same terms as persons who did *not* commit a capital crime, allowing him a chance of release after 15 years of incarceration. Pet'r Br. 57-58.

Finally, the logic of petitioners' argument extends well beyond 14-year-olds—a fact that petitioners themselves make no effort to conceal. Thus, petitioners candidly ask this Court to declare that the sentence of life without parole is categorically unconstitutional for persons who commit homicide before "the age of 18." Pet'r Br. 61. In truth, the logic of petitioners' position goes much further still. The premise of their argument is the empirical assertion that juveniles cannot be held fully accountable for their actions because the frontal lobes of their brains are not yet fully developed. *See* Pet'r Br. 20, 40-41. But the very research on which petitioners rely asserts that the frontal lobe of the human brain is not fully developed until the mid-20s. See, *e.g.*, Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77 (2004) (noting that human brains undergo significant development past age 20), (cited at Pet'r Br. 20, 21, 65); Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L. J. 1, 5 (2005) (arguing "that 'juvenile' should apply to those over eighteen and up to the age of twenty-two, which research suggests is the biological age of maturity.") (cited at Pet'r Br. 21, 65); *see also Amicus* Br. of American Psychological Association, *et al.* (APA Br.) 13 ("[S]kills required for future planning continue to

develop until the early 20s."); *id.* at 28 (noting that myelination in the brain continues into "early adulthood") (internal quotation omitted). If differences between mature and immature brains warrant the conclusion that life without parole may never be imposed on a 14-year-old, there is no reason why those differences would not warrant the same conclusion for defendants well into their twenties.

The upshot of this approach is a federal constitutional regime based not on law but on ever-evolving social and natural science. *See, e.g.*, The Royal Society, *Brain Waves Module 4: Neuroscience & the Law* 1-2 (Dec. 2011) ("At present there may be relatively little neuroscience that can be directly applied to the law, but this will surely change over the next ten to twenty years."); APA Br. 4 ("research suggests a *possible* physiological basis" for certain brain differences between juveniles and adults) (emphasis added). Penological lines based on such emerging science are the sort of lines that, in a democratic society, should be drawn by elected state legislators, not unelected federal judges.

At bottom, nothing in the text or history of the Eighth Amendment or this Court's precedents supports the one-size-fits-all categorical rule of constitutional law that petitioners are proposing here. To the contrary, that rule would represent a marked extension of this Court's decisions in *Roper* and *Graham*. If nothing else, this Court should heed Justice Jackson's sage advice: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (opinion concurring in the result). This Court should refuse to

add the additional story now requested by petitioners, lest the entire temple collapse of its own weight.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' briefs, the judgments in both cases should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICUS CURIAE* THE NATIONAL ORGANIZATION OF VICTIMS OF JUVENILE LIFERS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Victims of Juvenile Lifers ("NOVJL") is a national victims' rights organization comprised of the families of victims murdered by juvenile offenders who were tried and sentenced as adults because of the horrific nature of their extremely violent crimes. NOVJL works to find other victims of violent juvenile offenders tried and sentenced to life imprisonment in order to ensure that their voices are part of the national discussion concerning the imposition of life sentences on juveniles and to support each other as victims of the devastating acts of criminally violent teens. NOVJL works to protect and preserve victims' rights through public policy advocacy at both the federal and state levels and by filing amicus briefs in cases that bear on victims' rights. *See Graham v. Florida*, 130 S. Ct. 2011 (2009).

At the time of our nation's founding, crime victims were actively involved in the administration of justice. Indeed, early American criminal prosecutions generally were brought by the victim. *See* D. Beloof & P. Cassell, *The Crime Victim's Right to Attend the Trial: the Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484-85 (2005). But as the criminal justice system transformed to a public-prosecution model, victims' rights

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* NOVJL certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

often were overlooked. A task force commissioned by President Reagan to assess the treatment of crime victims in the criminal justice system found that these victims "have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional and financial—have gone unattended." President's Task Force on Victims of Crime, Final Report, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.

Victims' rights groups, buoyed by the work of the Task Force, succeeded in restoring many of the rights of victims in the criminal justice system. Now, every State in the Union either has enacted legislation or amended its constitution (or in some cases both) to expressly guarantee victims' rights.[2]

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2. ALA. CODE § 15-23-79; ALASKA CONST. art. I, § 24; ALASKA STAT. § 33.16.120; ARIZ. CONST. art. II, § 2.1; ARIZ. REV. STAT. ANN. § 13-4414; ARK. CODE ANN. §§ 16-90-1109, -1113; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16A; COLO. REV. STAT. ANN. §§ 24-4.1-302(2), -302.5; CONN. GEN. STAT. ANN. § 54-203; DEL. CODE ANN. TIT. 11, § 9416; FLA. CONST. art. I, § 16; FLA. STAT. ANN. § 960.001; GA. CODE ANN. §§ 17-17-13; HAW. REV. STAT. §§ 706-670, -670.5; IDAHO CODE ANN. § 19-5306; 725 ILL. COMP. STAT. ANN. 120/4.5; 730 ILL. COMP. STAT. ANN. 5/3-3-4; IND. CODE ANN. § 35-40-5-5; IOWA CODE ANN. § 915.18; KAN. STAT. ANN. § 22-3717; KY. REV. STAT. ANN. §§ 421.500, 421.520; LA. REV. STAT. ANN. § 46:1844; ME. REV. STAT. ANN. TIT. 17-A, § 1175; MD. CODE ANN., CORR. SERV. § 7-801; MASS. GEN. LAWS ANN. CH. 258B, § 3; MICH. COMP. LAWS ANN. § 780.769; MINN. STAT. ANN. § 243.05; MISS. CODE ANN. § 99-43-43; MO. ANN. STAT. § 595.209; MONT. CODE ANN. § 46-24-212; NEB. REV. STAT. § 81-1848; 2011 NEV. LAWS CH. 23 (A.B. 18); N.H. REV. STAT. ANN. § 21-M:8-K; N.J. STAT. ANN. § 52:4B-44; N.M. STAT. ANN. § 31-21-25; N.Y. CRIM. PROC. LAW § 440.50; N.C. CONST. art. I, §37; N.C. GEN. STAT. ANN. § 15A-1371; N.D. CENT. CODE § 12.1-34-02; OHIO REV. CODE ANN. § 5149.101; OKLA. STAT. TIT. 57 § 332.2; OR. REV. STAT. ANN. § 144.098; 61 PA. CONS. STAT. ANN. § 6140; R.I. GEN. LAWS §

Congress also has enacted multiple statutes to protect the rights of crime victims, including the Victim and Witness Protection Act of 1982, the Victim's Rights and Restitution Act of 1990, and the Crime Victims' Rights Act of 2004, which among other things ensures "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4).

Thus, both the States and Congress have recognized the importance of preserving the role of victims and victims' families[3] throughout the criminal process, from trial to sentencing and to parole proceedings for those

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12-28-6; S.C. CONST. art. I, § 24; S.C. CODE ANN. § 16-3-1560; S.D. CODIFIED LAWS § 24-15A-43; TENN. CODE ANN. § 40-38-103; TEX. CODE CRIM. PROC. ANN. art. 56.02; UTAH CODE ANN. § 77-27-9.5; VT. STAT. ANN. TIT. 13, § 5305; VA. CODE ANN. § 53.1-155; WASH. REV. CODE ANN. § 7.69.032; W. VA. CODE ANN. § 62-12-23; WIS. STAT. ANN. §§ 304.06, 950.04; WYO. STAT. ANN. §§ 1-40-204, 7-13-402; D.C. CODE §§ 23-1901, 23-1904.

3. There is a national consensus that the rights afforded to crime victims extend to the family members of murder victims. *See, e.g.*, 18 U.S.C. § 3771(e) ("For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter."); Ala. Code § 15-23-60(19) (defining "victim" as a "person against whom the criminal offense has been committed, or if the person is killed or incapacitated, the spouse, sibling, parent, child, or guardian of the person"). For this reason, the term "victim" is sometimes used in the literature on victims' rights as including the family members of a murder victim.

violent offenders that become eligible for release. After all, it is the families of the victims of juvenile murderers, and organizations such as NOVJL, that must always remind those charged with the administration of justice of the heinous acts that led these teenagers to be charged and sentenced as adults. *See* Pub. L. 97-291, § 2(a)(1) ("Without the cooperation of victims ... , the criminal justice system would cease to function.").

INTRODUCTION

Petitioners rely on psychological and scientific research to argue that "numerous features of adolescence" make teens who commit crimes "less culpable than adults." Jackson Br. at 5. Even assuming this is true as a general matter, it has little bearing on any individual comparison. *See* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) (Given that "[t]here is huge individual variability in the timing and patterning of brain development ... decisions about responsibility should be made on an individual basis at this stage of development."). As one court recently remarked, "[e]ven assuming that such psychological and scientific research is constitutionally relevant, the generalizations concluded therein are insufficient to support a determination that 14-year-olds who commit homicide are never culpable enough to deserve life imprisonment without parole." *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011) (affirming life-without-parole sentence imposed upon fourteen-year-old murderer).

Looking at the facts and circumstances of "[s]pecific cases," *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010),[4] it is quite clear that, despite their age, certain teen-aged murderers are more than capable of distinguishing right from wrong and fully appreciating the consequences of their actions. Indeed, this observation is reflected in the common-law maxim *malitia supplet ætatem*: malice supplies the want of years. As illustrated below, some teen-aged murderers exhibit sufficient malice to hold them accountable as adults for their murderous acts. Thus, a prophylactic constitutional rule prohibiting the imposition of a life-without-parole sentence on *any person* under 18 years of age would be unwarranted and improper. Whether such a sentence is justified should be assessed on a case-by-case basis. *See generally Graham*, 130 S. Ct. at 2036-42 (Roberts, C.J., concurring in the judgment).

Moreover, engrafting such a rule onto the Eighth Amendment would substantially harm victims' families. When juvenile murderers are sentenced to life, victims' families are able to achieve some measure of finality, at least with respect to the legal process. But if that sentence were made categorically unavailable, even for the worst offenders, these families would be forced to relive the facts of the murder over and over as they prepare for and participate in parole hearings. For them, that process

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4. *See also* Craig Lerner, *Juvenile Criminal Responsibility: Can Malice Supply The Want Of Years?*, 86 TULANE L. REV. 309, 339-40 (2012) ("Recounting the facts of a crime where a claim of juvenile immaturity is raised is essential in clarifying the kind of juvenile being discussed. ... [It] can dispel the idea that [the teen-aged murderers] are typical adolescents; it should alert one to the possibility that [teen-aged] murderers ... are atypical. So alerted, one might be inoculated from facile claims that defendants in such cases are just adolescents behaving badly.").

would never end, harming their mental and physical health as a result. Replacing the finality of the life-without-parole sentence with the recurring anguish of the parole process effectively imposes a sentence on victims' families—a sentence under which they must forever relive the crime that took their loved one's life and live in constant fear of a killer being turned loose.

A categorical ban on the imposition of the life-without-parole sentence on teen-aged killers would cause particular harm to the victims' families in cases in which the juvenile lifer's conviction and sentence are final. Because these families rightfully thought they had reached the end of the legal process, they would have had no reason to preserve court records or other relevant information that might bear on a parole decision. Without such information, they would be unable to mount an effective opposition to parole. Such a circumstance would render illusory the participatory rights conferred upon them and protected by the laws of all fifty states and the federal government. *See supra* note 2 & p. 3.

In sum, because the life-without-parole sentence may be constitutionally imposed on teen-aged killers under certain circumstances, categorically banning it under the Eighth Amendment would be improper. This is especially so because such a categorical approach would cause great harm to victims' families and undermine their right to participate in the criminal justice process.

ARGUMENT

I. LIFE IMPRISONMENT WITHOUT PAROLE IS AN APPROPRIATE SENTENCE FOR JUVENILES WHO COMMIT THE MOST HEINOUS MURDERS.

"[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." William Blackstone, 4 *Commentaries* 23. At common law, a fourteen-year-old was considered to have the same criminal capacity as an adult. Notwithstanding his age, the fourteen-year old was "*doli capax*" or "fully accountable for his criminal conduct." *Whitehead v. State*, 262 A.2d 316, 318 n.1 (Md. App. 1970) (citing Clark & Marshall, *Law of Crimes*, 6th Ed., § 6.12, pp. 391-394); *see also* Black's Law Dictionary 521 (8th ed. 2004) (defining "*doli capax*" as "[c]apable of committing a crime or tort; esp., old enough to determine right from wrong"). On the other hand, a child of seven years or less was considered *doli incapax*. *See, e.g., Dubiver v. City & S. Ry. Co.*, 75 P. 693, 694 (Or. 1904).

Those between ages seven and fourteen were presumed to be *doli incapax*, but that presumption could be overcome if the crime committed exhibited sufficient malice:

> Between the ages of seven and fourteen years an infant is deemed prima facie to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,) supplies the want of mature years.

Angelo v. People, 96 Ill. 209, 1880 WL 10095, at *2 (1880) (quoting *Broom's Legal Maxims* 232-33). "The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged prima facie innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion." 1 W. Blackstone, *Commentaries* 452-53 (1765) (quoted in *Com. v. Ogden O.*, 864 N.E.2d 13, 17 n.3 (Mass. 2007)).

Although the precise age at which the criminal justice system deems people *doli capax* may vary somewhat from jurisdiction to jurisdiction, *see, e.g.*, Alabama Br. at 5,[5] the maxim still holds—*malitia supplet ætatem*. And teen-aged murderers who commit crimes with sufficient malice may properly be deemed "fully accountable" for their conduct.[6]

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5. *See also* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) ("In England the age of criminal responsibility is ten. This means that up to the age of ten a child will not be held responsible for criminal acts. From the age of ten however, in the eyes of the law, a child is accountable in the same way as an adult for their behaviour, and is deemed sufficiently mature to stand trial and to engage in legal processes.").

6. It thus is constitutionally irrelevant whether psychological and scientific research suggests that teens as a class are less responsible for their criminal conduct than adults. Jackson Br. at 5. In any event, the research on this point is inconclusive at best. *See* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 409 (2006) ("The neuroscience evidence in no way independently confirms that adolescents are less responsible."); *see also* Alabama

The following examples illustrate the point. As they show, the life-without-parole sentence may be properly imposed on teen-aged murderers where malice supplies the want of years,[7] especially given that the Court not so long ago upheld a life-without-parole sentence imposed on a first-time offender who committed a nonviolent drug-possession crime, *see Harmelin v. Michigan*, 501 U.S. 957, 1002-04 (1991).[8]

Br. at 43-48. Moreover, some of the scholarly literature on the issue actually suggests that it is not that the underdeveloped brain causes risky behavior but that risky behavior may cause changes to the brain. *See, e.g.*, Robert Epstein, *The Myth of the Teen Brain*, SCIENTIFIC AM. MIND, April/May 2007, at 58 ("There is clear evidence that any unique features that may exist in the brains of teens—to the limited extent that such features exist—are the result of social influences rather than the cause of teen turmoil.").

7. The relative rarity with which the life-without-parole sentence is imposed on teen-aged murderers demonstrates only that legislatures and prosecutors properly reserve this sentence for particularly depraved murderers. Especially given that most States provide for the possibility of life without parole for at least some teen-aged murderers, *see* Alabama Br. at 9 ("Thirty-nine jurisdictions have statutes allowing 14-year-olds to be sentenced to life without parole for aggravated murder."), the infrequency with which this sentence is opposed cannot possibly support a finding that there is any sort of national consensus against it.

8. A murderer is surely much more criminally culpable than a non-violent, first-time drug offender, principally because murder, like the death penalty, is "'unique in its severity and irrevocability.'" *Graham*, 130 S. Ct. at 2027 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *see id.* ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.").

1. **Donald Torres (age 14)**

Victims: **Harry Godt (adult)**
Jennifer Godt (adult)
Jon Godt (age 4)
Jennifer Godt (age 1½)

At approximately midnight on February 24, 1989, Donald Torres broke into the home of his neighbor Harry Godt, knowing that Mr. Godt, his wife, and two young children were asleep on the second floor. Torres spread kerosene over the kitchen floor and the stairway to the second floor of the home. Using his lighter and some newspaper, Torres ignited the kerosene. From outside his apartment, Torres watched the flames spread through and engulf the Godts' home. He watched Mr. Godt run out of the house and then go back inside to attempt to save his family. Harry Godt, his wife, and their two young children all perished in the fire.

According to the State Medical Examiner, the Godts all died of asphyxia due to carbon monoxide saturation of the hemoglobin and third-degree burns that covered 90 to 95 percent of their bodies.[9] After initially denying any involvement, Torres later admitted to police that "he had intentionally started the fire to get back at Harry Godt because Godt had accused Torres of teaching [Godt's] son, Jon, to play with matches." Torres also admitted that he

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9. *See Torres v. State of Delaware*, 608 A.2d 731 (Del. 1992); *Torres v. State of Delaware*, 642 A.2d 837 (Del. 1994); *Torres v. Kearney*, No. 04-109, 2005 WL 3263098 (D. Del. Dec. 1, 2005).

had known that "the Godt family was in the home when he started the fire."[10]

A Delaware jury convicted Torres of four counts of intentional first degree murder and four counts of reckless first degree felony murder. He was sentenced to eight consecutive terms of life without parole.[11]

2. **Paul Dean Jensen Jr. (age 14)**

Victim: Michael Hare (adult)

Paul Jensen already had a record of shoplifting, vandalism, burglary, arson, stalking, and more when he committed premeditated murder.

On January 14, 1996, Jensen engaged in a "dry run" of his plan to rob a taxicab. At about midnight, a Pierre, South Dakota taxicab dispatcher received a call requesting a ride from Buhl's Laundry. When the taxi driver arrived, she was met by Jensen and his sixteen-year-old friend, Shawn Springer. At their request, the taxi driver took Jensen and Springer on a two-stop journey that ended only one block from where they met the cab in the first place. During the drive, Springer asked the taxi driver if anyone had ever stolen or tried to steal the cab money bag. The driver responded that if anyone did try to steal it, they could have it, as it only contained thirty dollars.

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10. *See* CHARLES D. STIMSON & ANDREW M. GROSSMAN, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 46 (Heritage Found. Aug. 2009).

11. *Torres*, 608 A.2d 731; *Torres*, 642 A.2d 837; *Torres*, 2005 WL 3263098.

Seven days later, Jensen, his sister, and Springer entered a friend's unlocked apartment and stole some cash, a necklace, a shotgun, and a handgun that turned out to be the weapon used to kill a taxi driver five days later. On the evening of January 26, 1996, Jensen showed the stolen handgun to a friend. He also showed the friend two or three ammunition clips. At around 11:00 pm, the Pierre taxi dispatcher received a call from Springer requesting to be picked up at the Days Inn and insisting to be picked up at "north back door." The dispatcher refused, stating that the cab would arrive at the office door. Springer indicated that there would be two passengers. When the dispatcher asked where they were going, Springer said, "Paul, where are we going?" Jensen replied, "I don't know. Fort Pierre, I guess. I don't know."

The taxi driver, Michael Hare, arrived at the Days Inn and shortly thereafter noticed Jensen and Springer coming from the back of the Days Inn. They entered the cab and directed Hare to take them to Fort Pierre. Jensen and Springer directed Hare to take them down a gravel road near Fort Pierre where the cab stopped. At this very same time, the dispatcher was trying to call Hare's cellular phone. Although Hare did not directly respond to her call, the dispatcher could hear Hare say over the cell phone: "That's all I have is thirty bucks. Take it. Take it all." The dispatcher then heard Jensen and Springer say, "That ain't all you got" and demand "everything." Hare replied, "That's all I have. They only give us thirty bucks. You can have it. Take it, take it all."

Jensen got out of the taxi with the stolen handgun drawn. He ordered Hare to exit the vehicle. After Hare got out of the vehicle, Jensen shot him in the chest. Hare

fell down and pleaded for his life, yelling, "Please God, don't kill me." Jensen approached Hare and shot him once more on each side of the head, killing him. Jensen then grabbed Hare's billfold and other items, which had been placed on the hood of the taxi, and jumped into the passenger seat. Springer and Jensen drove off, leaving Hare's lifeless body at the end of the gravel road. They were apprehended shortly thereafter by police, who had been alerted to the crime by the dispatcher.

Later, while Jensen was being held in the Juvenile Corrections Center in Rapid City, he bragged to the other juveniles in his holding area about having planned and executed the murder of a taxi driver. According to the testimony of one of the juveniles, "Jensen related the story of his cold-blooded execution-style murder in a calm and unfeeling manner."[12] A South Dakota jury convicted Jensen of first-degree murder. He was sentenced to life imprisonment without parole.[13]

3. Ashley Jones (age 14)

Victims: **Deroy Nalls (adult)**
Mary Nalls (adult)
Millie Nalls (adult)
Mary Jones (age 10)

In 1999, Ashley Jones and her sixteen-year-old boyfriend, Geramie Hart, plotted and executed a horrific crime that involved the murder of her grandfather and

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12. *State of South Dakota v. Jensen*, 579 N.W.2d 613 (S.D. 1998).

13. *Id.*

her Aunt Millie and would have involved the murder of her grandmother and her 10-year-old sister had they not miraculously survived the attack.

Hart and her ten-year-old sister Mary lived with their grandparents, Deroy and Mary Nalls. Jones's aunt, Millie Nalls, also lived in the house. Jones's family did not approve of her relationship with Hart, so she plotted with Hart to kill them, set the house ablaze, and abscond with their money.

On the night of August 29, 1999, Deroy Nalls was in the den watching television. His wife, daughter, and younger granddaughter were asleep in their rooms. Jones let Hart into the house. He was armed with Deroy's .38 caliber pistol, which Jones previously had smuggled to him. Jones and Hart entered the den, where Hart promptly shot Deroy twice in the face. Jones and Hart then moved quickly to Millie's bedroom where she had been sleeping and shot her three times. Seeing that she survived the gunshots, Jones and Hart hit her repeatedly with portable heaters, stabbed her in the chest, and set her room on fire. The pair next entered Mary Nalls's bedroom and shot her once in the shoulder, stopping only because it was their last bullet.

Jones and Hart returned to the kitchen area and discovered that Deroy was still alive. Hart hit him with various objects and stabbed him repeatedly, leaving the knife in his back. Jones then poured charcoal lighter fluid on her grandfather and set him on fire. Jones's young sister, Mary, woke up, and Jones led her into the kitchen area where she saw her grandfather on fire but still alive. Hart forced Deroy to disclose where he kept his money, and then stabbed Deroy in the throat. Jones then poured

lighter fluid on her grandmother and set her on fire. Jones and Hart watched her burn, and Hart urged Jones to pour more lighter fluid on her. Young Mary attempted to flee the kitchen, but Jones grabbed her and began hitting her. Hart pointed the gun at the young girl and said, "This is how you are going to die." Jones said, "No, let me do it," and stabbed her little sister 14 times. Jones and Hart then set the house ablaze.

Jones and Hart took $300 that had been hidden beneath her grandparents' mattress and drove away in their Cadillac. Miraculously, Mary Jones survived, despite suffering a collapsed lung and multiple stab wounds. The ten-year-old had pretended to be dead until Jones and Hart fled the burning house and then heroically helped her grandmother out of the house and contacted others for help.

Jones and Hart were arrested the next morning in a hotel room, where her grandparents' car had been found in the parking lot. Jones and Hart voluntarily confessed to the murders of Jones's grandfather and aunt and the attempted murders of her grandmother and little sister.[14] Upon learning that her younger sister had survived the attack, Jones remarked "I thought I killed that bitch."[15]

Jones was convicted of two counts of capital murder and two counts of attempted murder. She was sentenced to life imprisonment without parole. The sentencing judge noted that Jones "did not express genuine remorse for her actions." The judge also noted that "while awaiting her

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14. *See Hart v. State of Alabama*, 852 So.2d 839 (Ala. Crim. App. 2002).

15. *See* C. Stimson & A. Grossman, *supra*, at 27.

sentencing, the defendant had threatened older female inmates in the Jefferson County Jail by telling them she would do the same thing to them that she had done to her family."[16]

4. Omer Ninham (age 14)

Victim: Zong Vang (age 13)

Omer Ninham committed a murder that the Supreme Court of Wisconsin described as "a horrific and senseless crime [that] cannot adequately be reduced into words. The terror experienced by the victim and the hurt suffered by his family and friends is, in a word, unimaginable."[17]

On the evening of September 24, 1998, Zong Vang was riding his bike home with a bag of tomatoes his older brother had asked him to pick up from the grocery store. While riding along Webster Avenue in Green Bay, Wisconsin, Vang was approached by five teens: Ninham, 13-year-old Richard Crapeau, 13-year-old Jeffrey P., 14-year-old Amanda G., and 14-year-old Christin J.

Vang did not know any of them and had done nothing to provoke them. He just happened to encounter a group looking for a fight. Crapeau said to Ninham, "Let's mess with this kid," and Ninham responded, "'I got your back,' meaning he would back [Crapeau] up in a fight."[18]

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16. *State of Alabama v. Jones*, No. CC-2000-0151, 0152 (Ala. Cir. Ct. May 25, 2001) (finding of fact from guilt phase of trial).

17. *See State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

18. *See id.*

Ninham and Crapeau began taunting Vang and quickly attacked him. Crapeau then yanked Vang's bicycle away from him, grabbed Vang's grocery bag, and threw it in the street. After Vang asked them for his bicycle back, Ninham punched Vang, knocking him to the ground.

Vang got up and attempted to flee, running towards a parking ramp at St. Vincent's Hospital, which was on the same street. The attackers chased Vang, catching up to him at the top of the five-story parking ramp. When they reached Vang, Crapeau punched him in the face. Vang repeatedly begged for mercy and asked why they were trying to hurt him. But Ninham and Crapeau continued to attack Vang.

Ninham then pinned Vang against a concrete wall, and Crapeau punched Vang in the face. As Vang cried and screamed, "Let me go," Ninham and Crapeau lifted Vang up off the ground, with Ninham holding Vang's wrists and Crapeau holding Vang's ankles. Ninham and Crapeau "then began swinging Vang back and forth out over the parking ramp's concrete wall—a drop that measured nearly 45 feet to the ground." Vang, still crying and screaming, pleaded with Ninham and Crapeau not to drop him. Crapeau then let go of Vang's feet and urged Ninham to "[d]rop him." Showing no mercy to the still-pleading Vang, Ninham let go of Vang, leaving him to plunge five stories to his death. At just that time, a bystander exiting the parking facility down at ground level heard what sounded like a "bag of wet cement hitting the pavement." Vang landed on his back on the parking ramp's paved exit lane, 12 feet from the base of the ramp.

Ninham, Crapeau, and their companions fled the scene, leaving Vang in a heap on the concrete. One of the

other companions later testified that Ninham stood for several seconds looking over the edge of the wall at Vang on the ground below. Ninham then looked at Jeffrey P. and said, "Don't say nothing. Better not say shit." Rescue personnel were unable to revive Vang. The official cause of Vang's death was craniocerebral trauma resulting from his fall.

A jury convicted Ninham of first-degree intentional homicide and of physical abuse of a child for the death of the thirteen-year-old Vang. Ninham was sentenced to life imprisonment without parole.[19]

5. Scott Darnell (age 15)

Victim: Vicki Larson (age 10)

Scott Darnell already had a record that included molesting young girls, attempted rape, and assault with a deadly weapon when he raped and murdered Vicki Larson.[20] Indeed, it was only a month earlier that Darnell had been released from incarceration and placed in the custody of a parole officer.[21] He was on an authorized absence from a correctional facility at the time he raped and murdered Vicki.[22]

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19. *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

20. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 12, 1979).

21. *Larson v. Darnell*, 448 N.E.2d 249, 250 (Ill. App. 1983).

22. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 12, 1979).

On July 12, 1979, Darnell lured Vicki away from her brother's baseball game to a location in a nearby cornfield where he had already dug a shallow grave three days earlier. There, Darnell raped and strangled Vicki to death with a bandana. He then dumped her lifeless body into the pre-dug grave and buried her. In an attempt to conceal his crimes, he buried the bandana he had used to strangle Vicki. In addition, he threw his wristwatch into a nearby field in order to set up an alibi that he had been jumped and had his watch stolen.

Darnell and Vicki were the objects of an overnight search after they had been reported missing that evening. Local police came across Darnell the next morning, finding him "extremely dirty, wet and muddy." He told them that he had been jumped by two men on motorcycles who stole his watch.

Later on, Darnell confessed to the rape and murder-by-strangulation of Vicki Larson. He showed officers where he had buried his bandana and where he had thrown his watch. He also showed them the shovel that he had used to dig what would be Vicki's grave.[23]

Darnell was convicted of murder and rape at a bench trial. Darnell showed little emotion during the trial and verdict, but "joked freely with jailers and relatives during the recesses."[24] Darnell was sentenced to life imprisonment without parole. The sentencing judge

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23. Craig Brown, *Witnesses describe Darnell, scene of murder*, QUAD-CITY TIMES (Davenport, Iowa) (Jan. 29, 1980).

24. Craig Brown, *Judge finds Darnell guilty of rape, murder*, QUAD-CITY TIMES (Davenport, Iowa) (Feb. 8, 1980).

remarked that Darnell's rape and murder of Vicki Larson were "exceptionally brutal."[25]

A few years later, while Darnell was in prison for the rape and murder of Vicki Larson, prison officials uncovered and thwarted an elaborate escape plan that Darnell was in the process of carrying out. In uncovering the escape, the prison officials found a letter from Darnell addressed to Judge Jeffrey O'Connor, who had been the state's attorney who prosecuted Darnell. The letter read:

> You used me, you took my life as surely as if you would of sent me to the chair.
>
> Do you wonder why I write in red? It is the color of your blood. Do you have daughters, Jeffrey? If they are young, I'll be merciful with them. As merciful as I was with Viki. But regardless, they shall die.
>
> Wether wife sons daughter or any other, they shall die in front of your eyes.
>
> And when every cry is called, every tear shed, every drop of blood spilled before your feet, it will be your turn.... I will keep you alive for days. But you will die finally. And I'll feed you to the dogs.[26]

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25. Craig Brown, *Murderer's chilling letter never sent*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 2, 1984).

26. Craig Brown, *Murderer's chilling letter never sent*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 2, 1984).

II. A CATEGORICAL BAN ON THE LIFE-WITHOUT-PAROLE SENTENCE FOR JUVENILE KILLERS WILL NEEDLESSLY TRAMPLE ON THE RIGHTS OF VICTIMS.

The Court has remarked that the life-without-parole sentence is somewhat unique. *See Graham*, 130 S. Ct. at 2027. The way in which it is perhaps most unique is that it is the *only* sentence that allows victims to obtain legal finality. The life-without-parole sentence brings them certainty by terminating the legal process. *See Menzies v. Galetka*, 150 P.3d 480, 521 (Utah 2006) (Wilkins, J., concurring) ("[A] sentence of life without parole" is "more certain for the victims."). It avoids the interminable nature of the death penalty appeal process. *See id.* (describing the "seemingly endless requirements to review, re-review, analyze, and re-analyze any possible defect in the proceedings by which those found guilty of crimes so hideous that the death penalty is imposed"). And it enables victims to avoid the recurring pain of the parole process, which forces them to relive the horrors of these heinous crimes and paralyzes them with fear that the murderers who so callously took the lives of their family members might be released.

Imposing the parole process on victims' families thus comes at a substantial cost. Each parole proceeding inflicts on them the mental and physical anguish of replaying the murder in their mind's eye as they prepare for and attend parole hearings. Worse still, they must repeat this process over and over each time the killer become eligible for parole. And throughout this process, they live in constant fear that the killer will be set loose on society. For these reasons, a life-*with*-parole sentence has been likened to

"sentencing the victim and the victim's family, as well. ... It's a sort of a virtual prison, because ... as long as [the killers] are in jail ... and as long as they come up for parole, we're sharing that sentence with them."[27] To create a rule prohibiting life-without-parole sentences for all teen-aged killers would thus impose real and immeasurable harm on their victims.

This rule would be particularly unfair where the life-without-parole sentence is already final.[28] The criminal justice system promised these victims that the killers would never be released. Having obtained legal finality, these victims were able to move on. While they may never fully overcome the physical, emotional, and psychological trauma of the crime itself, at least they could rest assured that the killer would no longer be a threat to them or any other innocent person. Reopening final sentences and forcing the victims to again encounter these killers

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27. *Sentencing the Victim* (IVS Video Inc. 2002), PBS, Independent Lens (March 2, 2004), *available at* http://www.hulu.com/watch/55120/pbs-indies-sentencing-the-victim. In addition to the emotional and physical toll on victims, the recurring parole process forces victims to incur substantial financial costs. Victims must regularly take time off from work to attend parole hearings and pay for transportation to and from the location of the parole proceedings.

28. Although such a holding should not apply retroactively, it is possible that lower courts might wrongly conclude otherwise. *See In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (holding that *Graham* applies retroactively to cases on collateral review). The retroactivity problem could be avoided entirely if the issue were properly left to the state legislatures. *See e.g.*, Texas Penal Code § 12.31(a); *Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010) (noting that "the Legislature specified that the amendment of § 12.31(a) was not to be applied retroactively").

through the parole process would effectively transfer the life sentence from the perpetrator of the heinous crime to his innocent victim.

Moreover, invalidating final sentences of teen-aged murderers would thwart victims' participatory rights. There is a national consensus that crime victims have a right to participate in the criminal process. "As might be expected, statutes and constitutional provisions regarding specific crime victims' rights differ across jurisdictions, but there is general agreement about which victims' rights are most important." *See* Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. MED. & ETHICS 73, 78 (2004). These are victims' participatory rights, which "are designed to parallel defendants' rights to participate in criminal proceedings" and thus include the rights "to be notified about key criminal justice system proceedings and hearings, to be present at such hearings and proceedings, and to be heard at appropriate points in such hearings and proceedings." *Id.*; *see, e.g.*, ALA. CODE § 15-23-79(b) ("The victim shall have the right to be notified by the Board of Pardons and Paroles and allowed to be present and heard at a hearing when parole or pardon is considered."); ARK. CODE § 16-90-1113(a)(1)(A) ("Before determining whether to release the defendant on parole, the Parole Board shall permit the victim to present a written victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the defendant should be released on parole."); *id.* § 16-90-1113(a)(1)(B) ("At the victim's option, the victim may present the statement orally at the parole hearing.").

Because the life-without-parole sentence brings closure to the legal process, victims tend not to retain court records or take steps to preserve witness testimony or other important evidence. As time passes, victims may no longer have access to key evidence and information that has particular relevance to parole proceedings. Some NOVJL members, for example, have indicated that key witnesses to the murder of a family member have passed on. Others have noted that they do not have transcripts of key proceedings, such as when the sentencing judge explained the court's reasons for imposing a sentence of life without parole. And because electronic dockets are of relatively recent vintage (and do not even exist in some places), victims may be left with no means of obtaining information that might be crucial to determining whether a murderer stays in prison or is set free.

Without access to important evidence bearing on a parole determination, the promise of victims' participatory rights is an empty one. And because "parole boards cannot make sound decisions about the release of convicts from prison without information from victims," Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. MED. & ETHICS 73, 74 (2004), murderers who remain dangerous to the public may be set free among an unsuspecting public.

CONCLUSION

For the reasons set forth herein, the judgments of the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
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Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER

Petitioner,

v.

STATE OF ALABAMA

Respondent.

KUNTRELL JACKSON

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND THE SUPREME COURT OF ARKANSAS

BRIEF OF PROFESSOR OF LAW AND HIS STUDENTS FROM THE MORITZ COLLEGE OF LAW AT THE OHIO STATE UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a law professor and his law students who have been teaching, studying and writing about sentencing laws, issues, and policies. The drafters of this brief recently participated in a law school class in which they examined modern Eighth Amendment jurisprudence and its implications. Amici offer this brief to highlight sentencing principles deserving of attention in the consideration of whether juvenile offenders may be sentenced to life imprisonment without the possibility of parole.

SUMMARY OF THE ARGUMENT

Interpreting the Eighth Amendment's prohibition on cruel and unusual punishments, this Court has repeatedly stressed that juveniles are a special and unique class of criminal offenders who have a distinct level of maturity, mental capacity, and vulnerability to negative influences. In addition, this Court's Eighth Amendment jurisprudence has repeatedly recognized that not all homicide offenses are constitutionally equivalent; because murders can and will differ in their severity, a constitutional scheme of punishment must sometimes differentiate between and among murder offenses. This Court's Eighth Amendment jurisprudence has also identified constitutional problems

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution toward the preparation and submission of this brief. Counsel of records for both parties have consented to this brief's filing in letters on file with the Clerk's Office.

with certain aspects of some mandatory sentencing schemes. Collectively, these established jurisprudential principles connote that any statutory scheme which mandates that a juvenile offender convicted of a certain class of homicide must be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.

ARGUMENT

I. The Eighth Amendment requires a sentencing scheme to recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability.

This Court's Eighth Amendment jurisprudence has expressly and repeatedly stressed that juveniles are distinct types of criminal offenders due to their limited and still-developing maturity and mental capacity and due to their particular vulnerability to negative influences. Finding an Eighth Amendment violation in the death sentence imposed on a 16-year-old murderer, this Court three decades ago in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), effectively articulated why an offender's age is critical to an assessment of just punishment:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally

> are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.

Id. at 115–16. *Accord Johnson v. Texas*, 509 U.S. 350, 366 (1993) (discussing the constitutional significance of an offender's age in capital sentencing because a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young[, and these] qualities often result in impetuous and ill-considered actions and decisions"); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("[t]ime and again, this Court has ... observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults. ... The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

In numerous Eighth Amendment cases since *Eddings*, this Court has not only reiterated these uncontested facts about human development and the "mitigating qualities of youth," *Johnson*, 509 U.S. at 366, but it also has repeatedly struck down as unconstitutional punishment schemes that fail to give adequate legal effect to the realities of youthful status. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding unconstitutional life without parole sentences for all juvenile offenders who committed nonhomicide

offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding unconstitutional death sentences for all juvenile offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (finding unconstitutional death sentences for all offenders under 16); *cf. Johnson*, 509 U.S. at 366–70 (upholding a death sentence imposed on a 19-year-old murderer only because the sentencing jury was given instructions that provided "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth").

Though this Court first based assertions about juveniles' behavior and mitigated culpability on common sense observations, modern social and cognitive science has confirmed and amplified its insights about the social and moral significance of youth. As this Court highlighted most recently in *Graham*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," in part because "parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026. The research demonstrating distinct neurological characteristics of juveniles provides a firm and enduring biological foundation for this Court's long-standing position that the developing mind of juveniles entails that younger offenders "are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Id.*; *see also Johnson*, 509 U.S. at 366–70 (stressing that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"); *Roper*, 543 U.S. at 570 ("The personality traits of juveniles are more transitory, less fixed" than adults).

The very latest scientific research further confirms the Court's statements in *Graham* and prior cases about the nature of juveniles. Continuing research on adolescent psychology and brain neuroscience now provides even stronger evidence that significant brain developments occur through adolescence: recent studies suggest adolescents lack the fully developed cognitive ability to weigh the risks and rewards of their actions, and may also lack the ability to process emotional and social information leading to heightened susceptibility to negative influences.[2] Professor Laurence Steinberg, whose research was cited by this Court in *Roper*, recently addressed the emerging consensus in the scientific community by explaining that "[a]dolescents' neurobiological immaturity, relative to adults, is a fact, and within the neuroscience community, an uncontroversial one at that."[3]

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly upon what the "mitigating qualities of youth" entail whenever juveniles are subject to

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2. *See* Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 Developmental Psychobiology 263, 264 (2010); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 American Psychologist 739, 742–745 (2009).

3. Steinberg, *supra* at 742–745 (discussing in detail how the brain's gray and white matter develop during adolescence and have an impact on several key cognitive processes including response inhibition, planning ahead, and weighing risks and rewards, as well as how this development period also alters connections between cortical and subcortical regions of the brain critical for the processing of emotional and social information and control processes).

adult criminal sanctions and procedures. But the modern cognitive science combines with this Court's established punishment jurisprudence to fortify a transcendent Eighth Amendment principle articulated by this Court decades ago: a juvenile's criminal offense necessarily "is not as morally reprehensible as that of an adult." *Thompson*, 487 U.S. at 835. This principle, in turn, connotes that a constitutionally sound sentencing scheme ***must*** give some legal effect to an offender's juvenile status. As the Chief Justice recently put matters in *Graham*, "under our Court's precedents, [an offender's] youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive." 130 S. Ct. at 2042 (Roberts, C.J., concurring).[4]

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4. The conclusion in *Graham* and *Roper* that proportionate punishment schemes ***must*** recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability finds additional support in significant rulings of state supreme courts and in the doctrines of other nations which also trace their views of civilized punishment to the English Declaration of Rights of 1689. *See, e.g.*, *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) ("[w]e believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); *Naovarath v. State*, 779 P.2d 944, 946–47 (Nev. 1989) (overturning 13-year-old's life without parole sentence for murder while explaining that children "are and should be judged by different standards from those imposed upon mature adults" and that to "adjudicate a thirteen-year-old to be forever irredeemable and subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even if the criminality amounts to murder"); *Powers of the Criminal Courts (Sentencing) Act 2000*, § 90 (Eng.) (codifying prohibition of life without parole sentences for juveniles in the United Kingdom).

Any sentencing system that entirely fails to consider an offender's youth as one factor, among others, in deciding on that offender's punishment is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

II. The Eighth Amendment requires a sentencing scheme to make distinctions among different types of murder offenses in the imposition of the most severe possible punishments.

For more than a century, this Court has stressed that the Eighth Amendment's limit on excessive criminal sanctions flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). *Accord Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Roper*, 543 U.S. at 559; *see also Trop v. Dulles*, 356 U.S. 86, 100–02 (1958) (plurality opinion) (stressing that though "the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards" and that a punishment's constitutionality "depend[s] upon the enormity of the crime").

Consistent with precepts of justice concerning proportional punishment, this Court's resolution of Eighth Amendment challenges to capital punishment schemes have repeatedly stressed that the nature of the defendant's involvement in the offense and the defendant's culpable mental state are essential in any determination of whether and when our society's most severe punishments may be constitutionally imposed. *See, e.g., Lockett v. Ohio*, 438

U.S. 586, 608 (1978) (finding Ohio's capital sentencing procedures unconstitutional because the "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision"); *Enmund v. Florida*, 458 U.S. 782, 788–96 (1982) (explaining that "punishment must be tailored to [a defendant's] personal responsibility and moral guilt" and finding "impermissible under the Eighth Amendment" Florida's capital sentencing scheme because it failed to give effect to the critical fact that the defendant "did not kill or intend to kill"); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (upholding the constitutionality of the death penalty for murderers exhibiting "reckless indifference to human life"). *Accord Sumner v. Shuman*, 483 U.S. 66, 79–80 (1987) ("[t]his Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.")

Importantly, this Court's Eighth Amendment jurisprudence has not only declared that states categorically may ***never*** punish certain murder offenses with the death penalty, *see Enmund*, but it has also required states to develop statutory sentencing schemes that "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Loving v. United States*, 517 U.S. 748, 755 (1996); *see also Brown v. Sanders*, 546 U.S. 212, 216 (2006) ("[s]ince *Furman v. Georgia*, 408 U.S. 238 (1972), we have required States to limit the class of murderers to which the death penalty may be applied.").

This Court's Eighth Amendment rulings that (1) completely prohibit the punishment of death for some murder offenses and (2) expressly demand statutory schemes to narrow further which other murderers may be subject to this punishment are not merely unique and peculiar constitutional commands with significance only in capital cases. Rather, as an expression of the Eighth Amendment's fundamental limit on excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—this jurisprudence stands for and safeguards more broadly the principle that a constitutionally sound sentencing scheme must make legal distinctions among different classes of homicide in the imposition of our society's most severe punishments. It would be wholly inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to restrict significantly which murderers states can merely make eligible for the death penalty, but then permit states without any constitutional parameters to subject every other offender found legally responsible for another's death to suffer every other extreme form of punishment without any consideration of potentially mitigating offense factors.

More than a half-century ago, this Court in *Trop v. Dulles* rightly stressed that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." 356 U.S. at 100–01. This Court's subsequent Eighth Amendment jurisprudence, in turn, gives effect to this admonition by holding that *both* the nature of a defendant's involvement in an offense and his culpable

mental state are essential to a sound determination of whether and when our society's most severe punishments may be constitutionally imposed. Any sentencing system that imposes extreme and unbending punishments while refusing to consider or give any legal effect to the nature of a defendant's involvement in an offense and his culpable mental state is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

III. The Eighth Amendment requires a sentencing scheme to avoid problematic application of extreme mandatory punishments.

Providing another significant expression of the Constitution's demand for reliable and proportionate application of society's most severe punishments, this Court has long declared that the Eighth Amendment prohibits states from making death a mandatory punishment for even the most culpable forms of aggravated murder. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Not only is it constitutionally essential that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, but the Eighth Amendment categorically precludes states, even when responding to murders committed by those already serving life sentences for prior murders, from adopting any laws that fail to consider offenders "as uniquely individual human beings" instead of as "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Sumner*, 483 U.S. at 74–75 (quoting *Woodson*, 428 U.S. at 304).

Critically, this Court began establishing the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner*, 483 U.S. at 75, based expressly our nation's long-standing "prevailing practice of individualizing sentencing determinations," *Woodson*, 428 U.S. at 304, which reflects more broadly "society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" *Roberts*, 428 U.S. at 333 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Pepper v. United States*, 131 S. Ct. 1229, 1239–40 (2011) ("[I]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

This Court has generally described our nation's tradition of individualized sentencing determinations as "simply enlightened policy rather than a constitutional imperative" outside the death penalty setting. *Woodson*, 428 U.S. at 304. But the imposition of the extreme sentence of life without parole is, functionally, a life-and-death punishment determination for a defendant; consequently, the "fundamental respect for humanity underlying the Eighth Amendment," *id.*, should likewise demand a process that enables a sentencer to "be able to consider and give effect to [mitigating] evidence in imposing sentence"

so to be confident that the imposition of life without any possibility of parole reflects "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Given the Eighth Amendment's fundamental concern with excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—a constitutionally sound sentencing scheme must allow the sentencing authority (and not merely a partisan prosecutor through the unregulated and hidden exercise of charging and bargaining discretion) to have some formal and functional mechanism for distinguishing which offenders may need and deserve to be forever caged and condemned to die in prison and which may not. Again, it would be inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to require states to give all repeat intentional murderers already serving life terms a constitutional right to always argue for a reduced sentence, but then permit states without any constitutional parameters to mandate that every other homicide offender always be condemned to die in prison without giving any consideration or legal effect to potentially mitigating offense or offender factors.

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly on whether and when mandatory application of life without the possibility of parole sentences is now contrary to the "the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 100–01, and thus fails to reflect properly the "history, tradition, and precedent" of the

Eighth Amendment "with due regard for its purpose and function in the constitutional design." *Roper*, 543 U.S. at 555–56. But in light of this Court's established jurisprudence that a defendant's youth and immaturity are paradigmatic examples of constitutionally essential mitigating evidence, these cases do present an important opportunity to declare that any statutory scheme which ***mandates that a juvenile offender*** convicted of a certain class of homicide be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.[5] *See generally* Brief for Petitioner in *Miller v. Alabama*, No.

5. Tellingly, there is a history of state supreme courts overturning life without parole sentences for juveniles who commit homicide based on their recognition that the permanence of such a sentence fails to allow any discretionary assessment of whether a young offender is indisputably irredeemable. The California Supreme Court, for example, overturned a youth's life without parole sentence after taking into consideration his age and finding he was an "unusually immature youth" who had never been in trouble with the law before, and was not a "hardened criminal" who poses a "grave threat to society." *People v. Dillon*, 668 P.2d 697, 726–27 (Cal. 1983). The Nevada Supreme Court, when overturning a life without parole sentence for a boy who was convicted of murdering a disabled man who had molested him, similarly stressed the that "the child before us [could be] the beginning of an irremediable dangerous adult human being, but we certainly cannot know that fact with any degree of certainty ***now***." *Naovarath*, 779 P.2d at 947 (emphasis in original). These rulings reflect the sound view that an individualized judgment of a juvenile offender's character and his offense's circumstances is essential for juvenile sentencing to avoid the risk of imposing cruel and unusual punishments through adult mandatory sentencing structures.

10-9646, at 25–29 (highlighting why mandatory life-without-parole sentencing of juveniles is different in kind from mandatory sentencing of adult offenders). Again, because "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive," *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring), any sentencing system that mandates a life without parole sentence without allowing in any way the sentencing authority to consider mitigating factors is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

IV. The Eighth Amendment precludes a sentencing scheme that mandates extreme prison sentences for especially young juveniles like Kuntrell Jackson and Evan Miller, whose homicide offenses were not among the "worst of the worst."

The Eighth Amendment principles stressed above are especially important in these cases because Kuntrell Jackson and Evan Miller, both only fourteen years old at the time of their homicide offenses, plainly were not guilty of an extreme type of intentional murder for which society and its laws typically ascribe the most extreme punishments. Kuntrell Jackson, for example, was just a peripheral participant in a video store robbery in Arkansas; he merely entered the store as two older boys were already pointing a gun at the store clerk, and he was not directly involved in, nor never intended, the shooting of the clerk. *See Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004). As Kuntrell Jackson's brief highlights, *see* Brief for Petitioner in *Jackson v. Hobbs*, No, 10-9647, at

63–64, arguably his culpability is even less than Terrance Graham's, the repeat offender who at age 17 committed his second armed robbery and yet still could not be constitutionally sentenced to the life without parole term that Kuntrell Jackson is now serving. Notably, and again in contrast to Terrance Graham's situation, no judge ever decided that a life without parole sentence was needed or justifiable for Kuntrell Jackson; he was sentenced to this extreme prison term only by virtue of a statute which mandated this sentence for anyone who participated in a capital felony-murder (and because of the decision by state prosecutors to try him in adult court). The sentencing judge in this case did not—indeed, under the law as it applied here, was not permitted to—consider Kuntrell Jackson's young age, his limited involvement in the offense, his diminished culpability based on his mental state, or any other mitigating factors.

Kuntrell Jackson's case especially illustrates the necessity for special constitutional reservations regarding any sentencing schemes that involve what might be called "categorical conclusions"—such as the imposition of mandatory life without parole sentences for all offenders who commit a certain crime. *Cf. Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring). As members of this Court have stressed, painting with a broad, one-size-fits-all constitutional brush risks failing to respect the reality that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable" that extreme prison sentences may sometimes be justifiable. *See id.* at 2042. This reality, in turn, highlights the constitutional importance of a sentencing scheme that recognizes that "exceptional case[s]" occur and that a state's mandatory "categorical rule[s] applicable to far different cases" at

sentencing is constitutionally suspect and will sometimes result in constitutionally excessive punishments. *Id.*

For these reasons, Kuntrell Jackson and Evan Miller's appeals do not require this Court to reach a firm constitutional conclusion as to whether an extreme prison sentence might sometimes be justifiable when, for example, a teenager lines up a family of four in front of a ditch and brutally guns them down, one by one—assassinating three in cold-blood and seriously injuring the fourth as they beg to be spared. *Cf. Tennessee v. Howell*, 34 S.W.3d 484, 487–88 (Tenn. Crim. App. 2000) (noting, inter alia, that the teenage defendant bragged about his killing spree while in custody); *see also State v. Martin*, 773 N.W.2d 89, 89 (Minn. 2009) (describing a particularly cold-blooded intentional murder by a teenage gang member); *Phillips v. Florida*, 807 So. 2d 713, 715 (Fla. Dist. Ct. App. 2002) (describing an exceptionally brutal and violent intentional murder of a young child by a teenager). Though this Court certainly could again take a "categorical approach" to examine in these cases whether and when certain juvenile offenders may be subject to certain extreme punishments, *cf. Graham*, 130 S. Ct. at 2021-23, this Court should not fail to acknowledge and hold at the very least that, "given all the circumstances," the extreme punishments of life without the possibility of parole mandatorily imposed on Kuntrell Jackson and Evan Miller are unconstitutionally excessive. *See id.* at 2036 (Roberts, C.J., concurring) (explaining that defendant's "juvenile status ... together with the nature of his criminal conduct and the extraordinarily severe punishment imposed" sufficiently justifies conclusion that noncapital sentence violated the Eighth Amendment based on the "particular defendant and particular crime at issue").

CONCLUSION

For these reasons, this Court should declare the life without parole sentences of Kuntrell Jackson and Evan Miller to be unconstitutional.

Respectfully submitted,

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